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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1024.

THE UNITED STATES, APPELLANT,

vs.

JOHN PAUL JONES, ADMINISTRATOR OF THE ESTATE OF GEORGE McDOUGALL, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 27, 1886.

SUPREME COURT OF THE UNITED STATES.

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1 I.—*Petition of John Paul Jones to be allowed to file petition as administrator.—Filed in open court Dec. 8, 1884.*

In the Court of Claims.

In the matter of the claim of the late

GEORGE MCDOUGALL }
vs. } No 14507.
THE UNITED STATES. }

To the honorable the judges of the Court of Claims:

The petition of John Paul Jones respectfully shows to your honors that heretofore, to wit, upon the 14th day of May, 1842, George McDougall, who was a citizen of the city of Indianapolis, in the State of Indiana, departed this life intestate, at the city of Washington, in the District of Columbia; and that the matter of the above-entitled claim was then, and has since been, until the 1st day of December, 1884, pending in the Department of the Interior, but that upon said last mentioned date said claim, together with all the papers, proofs, and documents appertaining thereto, was transmitted to the court by the honorable Secretary of the Interior for adjudication under the provision of section 1063, Revised Statutes of the United States.

Your petitioner further shows that since the said reference he has taken out letters of administration upon the estate of the said George McDougall, deceased, in the orphan' court of the District of Columbia.

Wherefore your petitioner prays that he may be allowed to bring into court proof of his appointment as administrator as aforesaid, and to file his petition as such administrator in the above-entitled cause, and to prosecute the same to a final judgment and for all other proper relief.

JOHN PAUL JONES.

2 I consent, without prejudice, to the intervention of any other party claiming to represent the original claimant.

Dec. 8, 1884.

THOS. SIMONS,
Ass't Att'y-General.

Exemplified copy of letters of administration filed December 11, 1884.

JOHN RANDOLPH,
Ass't Clerk Ct of Claims.

3 In the Court of Claims.

JOHN PAUL JONES, ADMINISTRATOR OF THE estate of George McDougall, deceased, }
vs. } No. 14507.
THE UNITED STATES. }

II.—*Petition.—Filed Dec. 13, 1884.*

To the honorable chief justice and associate justices of the Court of Claims.

The petition of John Paul Jones respectfully shows to your honors:

I.

That he is the administrator of the estate of George McDougall, who departed this life intestate on the 14th day of May, 1872, at the city of

Washington, in the District of Columbia, duly qualified as such under the laws of the District of Columbia, and that he brings this suit in his right as such administrator, said cause having been referred to this honorable court for adjudication under the provisions of section 1063, Revised Statutes of the United States.

II.

That by the acts of Congress approved September 30, 1850 (Stats. 9, p. 558), and February 27, 1851 (Stats. 9, p. 572), it was provided that eight treaties should be negotiated between the United States and certain
4 Indian tribes in California, and an appropriation was made thereby for the expenses of "holding" such treaties, and it was further provided by an act approved February 27, 1851 (Stats. 9, p. 586, sec. 3), "that hereafter all Indian treaties shall be negotiated by such officers and agents of the Indian Department as the President of the United States may designate for that purpose," &c.

III.

That in obedience to the provisions of said acts the President appointed three commissioners, to wit, Redick McKee, George Barber, and Oliver M. Wozencraft, to negotiate treaties with the said Indians in California.

IV.

That in view of the then unsettled condition of affairs in California (that territory having been but recently acquired by the United States), and the fact that a general Indian war was threatened, if not in actual existence, these said commissioners were given, collectively and individually, the widest discretion in supervising the Indian affairs in California, and negotiating treaties with said tribes, by the instructions issued to them by the Hon. Secretary of the Interior.

V.

That after their arrival in California the said commissioners separated (as they were authorized to do by their instructions), each taking a certain portion of the State as his exclusive territory, in which to conciliate the said hostile Indians; and, finding that these hostilities were largely the result of the starving condition of said Indians, they having been driven from their homes by the invasion of American citizens, who were then flocking to California in search of gold, the said commissioners,
5 exercising that discretion which was given them by their instructions, as aforesaid, adopted the policy of supplying them (the said Indians) with provisions, relying upon the Government to sustain them and to fulfill their contracts, &c.

VI.

That for the purpose aforesaid, O. M. Wozencraft, one of the said commissioners, entered into the following contract with George McDougall, now deceased, to wit:

Articles of agreement entered into this fifth day of April, A. D. eighteen hundred and fifty-two, between O. M. Wozencraft, United States In-

dian agent for California, of the first part, and George McDougall, of San Francisco, of the second part.

"The said party of the first part agrees to contract with the party of the second part for two thousand and five hundred head of cattle, to be delivered as follows, viz, one thousand head to be delivered to Stephen Hutchinson, U. S. Indian trader, resident at San Gorgonia, for the 'Cohaulla' tribe of Indians, five hundred head to be delivered to J. T. Ruckle, U. S. Indian trader, resident at 'Tamacula,' and one thousand head to be delivered to the Indians at 'Aqua Callienti,' near Womer's Ranche.

"In consideration for which the party of the first part is to pay the party of the second at the rate of twelve and one-half (12½) cents per pound (weight net), the weight to be estimated and agreed upon between the U. S. Indian traders and the party of the second part.

"It is further understood that if there should be no appropriation by Congress this present session for the payment of this contract, then the parties of the second part are to receive fifteen and one-half cents per pound.

"It is also further understood that one-half of the cattle contracted for may be 'Torones,' at the option of the party of the second part; and it is further understood the cattle are to average five hundred pounds in weight each; if not, the weight to be made up by additional cattle, so that the original estimate may be complete.

6 "It is further understood that the delivery of the cattle are to commence on the first of May next ensuing.

"San Francisco, April 5, 1852.

"O. M. WOZENCRAFT. [SEAL.]
"*U. S. Indian Agent.*
"GEO. McDOUGALL. [SEAL.]

"Witness:
"J. T. RUCKLE."

VII.

That in pursuance of said contract the said George McDougall did, at various times and places, deliver to certain agents of the Government one thousand (1,000) beeves, averaging in weight six hundred and fifty (650) pounds each, in all six hundred and fifty thousand (650,000) pounds of beef, and that said amount of beef was receipted for by the agents of the Government, J. T. Ruckle and Stephen Hutchinson, and that said beef was actually converted to the use of the Indians.

VIII.

That in payment for said beef O. M. Wozencraft drew two certain bills on the Hon. Luke Lea, Commissioner of Indian Affairs, payable "upon an appropriation by Congress to fulfill treaty stipulations in Southern Agency of California," both bearing date May 26, 1852; one for the sum of forty-one thousand dollars ($41,000), which your petitioner is unable now to produce, and the other for the sum of thirty thousand two hundred and fifty dollars ($30,250), and both payable to the order of George McDougall; and that the said bills were duly presented to the

7 drawee thereof and payment refused, no appropriation having been made by Congress to carry into effect the treaty stipulations.

IX.

That by the terms of said contract the said McDougall was to receive twelve and a half cents per pound for the beef delivered, provided the same was appropriated for during the then pending session of Congress, and if not, then he was to receive fifteen and a half cents per pound for the same; and that the necessary appropriation not having been made within the time specified, the said O. M. Wozencraft drew his third bill in favor of George McDougall, bearing date 20th September, 1852, on the Hon. Luke Lea, Commissioner of Indian Affairs, for the sum of nineteen thousand five hundred dollars ($19,500), which your petitioner is unable now to produce, but of which he produces a true copy, the same being the difference between the price of said beef at twelve and a half cents per pound and fifteen and a half cents per pound, and that said bill was likewise duly presented for payment and payment thereof refused.

X.

Your petitioner further shows that neither he nor his intestate ever bore arms against, or voluntarily aided, abetted, or gave encouragement to rebellion against, the United States Government, and that no assignment of said claim, or of any part thereof, has ever been made by your petitioner or his intestate.

Wherefore your petitioner prays judgment against the defendants in the sum of one hundred and one thousand five hundred dollars ($101,500), and all other proper relief.

JOHN PAUL JONES,
Administrator.

8 DISTRICT OF COLUMBIA, *ss:*

John Paul Jones, being duly sworn according to law, upon his oath says that the matters and things stated in the foregoing petition are true to the best of his knowledge and belief, and that James W. Denver is his attorney herein.

JOHN PAUL JONES.

Subscribed and sworn to before me this 13th day of December, A. D. 1884.

[SEAL.] CHARLES S. BUNDY,
Notary Public.

(Endorsed:) No. 14507. In the Court of Claims. John Paul Jones, adm'r, vs. The United States. Original petition. Filed Dec. 13, 1884; A. H. J. W. Denver, att'y of record.

9 III.—*General traverse.*—*Filed Jan'y* 19, 1885.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or

given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

10 IV.—*Findings of fact.—Filed May* 3, 1886.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

This claim has been pending in the Interior Department and before Congress for many years, but has never been finally disposed of.

II.

Under act September 28, 1850 (9 Stat. L., 519), Redick McKee, George W. Barbour, and Oliver M. Wozencraft were duly appointed agents for the Indian tribes within the State of California. On October 9, 1850, Oliver M. Wozencraft, George W. Barber, and Redick McKee were appointed commissioners "to hold treaties with the various Indian tribes in the State of California," as authorized by the act of 30th September, 1850. Upon the passage of the act February 27, 1851 (9 Stat. L., 586), they were informed that their offices and functions as commissioners were abrogated and annulled. They were at the same time directed not to suspend negotiations, but to enter upon their appointments as agents, and were as such designated under the act of 1851, to negotiate with the Indians of California, under the instructions already given.

The instructions referred to did not extend to and embrace contracts for the subsistence of the Indian tribes, but only authorized such commissioners to hold treaties with such Indians.

11 III.

Among the instructions given the said commissioners, under date of October 15, 1850, were the following:

"As set forth in the law creating the commission, and the letter of the Secretary of the Interior, the object of the Government is to obtain all the information it can with reference to tribes of Indians within the boundaries of California, their manners, habits, customs, and extent of civilization, and to make such treaties and compacts with them as may seem just and proper.

"On the arrival of Mr. McKee and Mr. Barbour in California they will notify Mr. Wozencraft of their readiness to enter upon the duties of the mission. The board will convene, and after obtaining whatever light may be within its reach, will determine upon some rule of action most efficient in attaining the desired object, which is by all possible means to conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties, binding on them, towards the Government and each other. You will be able to judge whether it is best for you to act in a body or separately in different parts of the Indian country."

Again on May 9th, 1851, the Commissioner of Indian Affairs wrote to the commissioners, using the following words:

"What particular negotiations may be required it is impossible for this office to foresee; nor can it give any specific directions on the subject. Much must be left to the discretion of those to whom the business is immediately entrusted."

12 IV.

When the commissioners arrived in California they found open hostilities existing between the Indians and the whites, and a general war had been agreed upon by the Indians. The governor of California had, at the request of Adam Johnston, the Indian agent, called out a portion of the militia of the State, and had organized a military force to operate against the Indians. To avoid the threatened, and quell the actual, hostilities, the commissioners at once began to negotiate treaties with the Indians, by which they were required to leave their mountain resorts, to abandon their lands to the whites, to descend to the plains, and reside peaceably upon a tract of land selected for them. In return the commissioners promised the Indians that the United States would give them seeds to plant and implements to work with; establish schools, and appoint persons to teach them how to cultivate their lands and provide for their own wants.

V.

The policy adopted by the commissioners included the "subsistence" of the Indians, and large quantities of beef and other provisions were stipulated for in the various treaties, and the office was notified that the same policy would have to be pursued throughout the whole State, and that this system was thought much better than the system of annuities. The letters in which these statements were made were written on May 1st, 1851, and May 13th, 1851.

On June 27th, 1851, the Indian Office wrote to the commis-
13 sioners, suggesting to them "that when the appropriation of $25,-000 for holding treaties was exhausted, they should close their negotiations and proceed with the discharge of their duties as agents simply, as the Department could not feel itself justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress."

On 16th July, 1851; the office wrote to Barbour, one of the commissioners, saying: "In the copies of treaties made with the several Indian tribes heretofore transmitted to this office there are provisions for delivering them sundry articles in 1851, which cannot be complied with, as Congress will not be in session in time to make the necessary appropriations. Should you conclude other treaties, you will fix the time and payments, under any stipulation, at a period sufficiently in the future to allow of Congressional action to meet the requisitions;" and on 9th July, 1851, the office wrote to Wozencraft, speaking of the "treaties you have concluded or may hereafter negotiate," and directing him to transmit in every case the estimate of money that will be required, &c. On August 9th, 1851, after the Indian Office had notified the commissioners that the "appropriation for holding treaties" was exhausted, the Commissioner wrote to Redick McKee acknowledging the receipt of the joint letter of the commissioners, in which they stated that the policy of furnishing

"subsistence must be pursued throughout the whole State;" and in this letter of acknowledgment he made no complaint and gave no advice or instruction to the contrary. And on September 15th, 1851, he wrote to Wozencraft acknowledging copies of treaties "and return of expenditures, contracts, and disbursements."

14 On May 17th, 1852, the Indian Office wrote Agents McKee and Wozencraft saying: "* * * I have therefore to request that, at the earliest practicable period, you make a full and detailed report directly to this office of all contracts, debts, and liabilities made and incurred by the agents of the Department in California."

Agent Wozencraft negotiated over one hundred treaties.

No disapproval or complaint of the actions of the commissioners, agents, or subagents, who were connected with the foregoing transactions, either by the President, Secretary of the Interior, or Commissioner of Indian Affairs, appears.

The agent, Wozencraft, without specific instructions so to do, made and entered into the following articles of agreement with the late George McDougall, who died May 14th, 1872, and whose administrator now brings this suit:

Articles of agreement entered into this fifth day of April, A. D. eighteen hundred and fifty-two, between O. M. Wozencraft, United States Indian agent for California, of the first part, and George McDougall, of San Francisco, of the second part.

The said party of the first part agrees to contract with the party of the second part for two thousand and five hundred head of cattle, to be delivered as follows, viz, one thousand head to be delivered to Stephen Hutchinson, U. S. Indian trader, resident at San Gorgonia, for the Cohaulla tribe of Indians; five hundred head to be delivered to J. T. Ruckle, U. S. Indian trader, resident at Tamacula, and one thousand head to

15 be delivered to the Indians at Aqua Callienti, near Womer's Ranche.

In consideration for which the party of the first part is to pay the party of the second part at the rate of twelve and one-half (12½) cents per pound (weight net), the weight to be estimated and agreed upon between the U. S. Indian traders and the party of the second part.

It is further understood that if there should be no appropriation by Congress this present session for the payment of this contract, then the parties of the second part are to receive fifteen and one-half cents per pound.

It is also further understood that one-half of the cattle contracted for may be "torones," at the option of the party of the second part; and it is further understood the cattle are to average five hundred pounds in weight each; if not, the weight to be made up by additional cattle, so that the original estimate may be complete.

It is further understood that the delivery of the cattle is to commence on the first of May next ensuing.

San Francisco, April 5, 1852.

O. M. WOZENCRAFT. [SEAL.]
U. S. Indian Agent.
GEORGE McDOUGALL. [SEAL.]

Witness:
J. T. RUCKLE.

VII.

In pursuance of this contract this decedent delivered to J. S.
16 Ruckle and Stephen Hutchinson, U. S. Indian traders, one thousand head of cattle, averaging 650 pounds each, and took from them the following receipt:

LOS ANGELES, *May* 17, 1852.

Received of George McDougal, the contracting party for supplying the "Cow-we-ha," "San Louis," and "Dieganian" tribes of Indians with beef cattle, one thousand head of cattle, averaging six hundred and fifty pounds weight each.

J. S. RUCKLE,
United States Indian Trader for the "San Louis" Indians and "Dieganians."
STEPHEN HUTCHINSON,
United States Indian Trader for the Cow-we-has Tribe of Indians.

The parties to whom the property was delivered were those nominated in the contract, and were licensed United States Indian traders, and the weight of the beef was agreed upon by the parties designated by the contracting parties, viz, McDougall and Ruckle & Hutchinson. It was customary, at this time, to estimate the weight of cattle, and not to sell them by actual weight.

The price for beef at that time is shown to have been frequently as high as 20 cents per pound, by wholesale.

VIII.

Claims similar to the one at bar have been paid by the U. S. Government as follows: John C. Fremont (Stats., 10, p. 804), $183,025,
17 with interest at 10 per centum per annum from June 1, 1851; Samuel J. Hensley (Stat., 12, p. 847), $96,576; Samuel Norris, $69,900 (2 C. Cls., 155); Fremont's case, $13,333.33 (2 C. Cls., 461); Fremont & Roache's case (4 C. Cls., 252), $46,666; Belt's case (15 C. Cls., 92), $10,715.19.

The drafts upon which Samuel Hensley recovered were drawn by Wozencraft upon the Secretary of the Interior, and were dated February 11, 1852, and the agreement under which the said drafts were drawn was dated February 10, 1852. The contract with Samuel Norris was made by same party on December 31, 1851. The contracts upon which Belt & Co. recovered were entered into between Belt and Subagent Johnson at various times from August 5, 1851, to January 31, 1852, and on August 12, 1851, the Interior Department approved "of the motive which prompted him (Agent Johnson) to furnish additional subsistence to the Indians," and informed him that an appropriation would be made.

Wozencraft reported the amount of the Government's indebtedness to McDougall as amounting to $101,500.

IX.

The Indians who were dispossessed of their lands under these treaty stipulations ceased their warfare and ever after remained peaceable, but

never recovered possession of their lands, although the treaties were not ratified by the Senate, but the United States assumed title to said lands and disposed of them in the same manner as other portions of the public domain have been disposed of.

18 CONCLUSION OF LAW.

Upon the foregoing findings of fact, the court decides as conclusion of law:

The claimants should recover the sum of $81,250.

19 V.—*Final judgment.*

At a Court of Claims held at the city of Washington, D. C., on the 3rd day of May, A. D. 1886, judgment was ordered to be entered up as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the said John Paul Jones, as administrator, do have and recover of and from the United States the sum of eighty-one thousand two hundred and fifty dollars ($81,250.00).

20 VI.—*Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause, on the 3rd day of May, 1886, in favor of claimant, the defendants, by their Attorney-General, on the 25th day of May, 1886, make application for and give notice of an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Assistant Attorney-General.

Filed May 25, 1886.

And now, to wit, May 25, 1886, it is ordered by the court that the appeal be allowed as prayed for.

WILLIAM A. RICHARDSON,
Chief Justice.

21 VII.—*Motion for a cross appeal, filed by claimant Aug. 2, 1886.*

Comes now the claimant in person, and prays an appeal from so much of the judgment of the court as disallowed claimant's demand for the sum of nineteen thousand five hundred dollars ($19,500), according to the terms of the agreement entered into by and between O. M. Wozencraft and the decedent.

JOHN PAUL JONES,
Administrator.

Filed August 2, 1886.

AT CHAMBERS.

Allowed Aug. 2, 1886.

WILLIAM A. RICHARDSON,
Chief Justice.

22 In the Court of Claims.

VIII.

JOHN PAUL JONES, ADMINISTRATOR OF THE ESTATE of George McDougall, dec'd,
vs.
THE UNITED STATES. } No. 14507.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the final judgment of the court, of application of the defendants and of the claimant respectively for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this twentieth day of September, 1886.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

(Indorsement on cover:) No. 1024. The United States, appellant, vs. John Paul Jones, administrator of the estate of George McDougall, deceased. Court of Claims. Filed September 27, 1886.

22 In the Court of Claims.

VIII.

JOHN PAUL JONES, ADMINISTRATOR OF THE ESTATE of George McDougall, dec'd,
vs.
THE UNITED STATES.
} No. 14507.

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In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this twentieth day of September, 1886.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

(Indorsement on cover:) No. 1024. The United States, appellant, vs. John Paul Jones, administrator of the estate of George McDougall, deceased. Court of Claims. Filed September 27, 1886.

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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANTS,
vs.
JOHN PAUL JONES, ADMINISTRATOR of the estate of George McDougall, deceased. } No. 1024.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES, APPELLANTS,
vs.
JOHN PAUL JONES, ADMINISTRATOR of the estate of George McDougall, deceased. | No. 1024.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

Statement.

The alleged claim in this case grows out of the unauthorized and illegal acts of O. M. Wozencraft, United States Indian agent in California. It is one of a number of similar claims arising out of the illegal and unauthorized transactions of Indian commissioners, agents, and subagents in the early history of California. In the case at bar Wozencraft, on April 5, 1852, entered into a contract, without authority, with George McDougall, appellee's decedent, for the purpose of supplying certain Indian tribes in California with beef. The contract was illegal and void,

and has not in any manner been ratified by the Government, or by any officer or agent of the same.

The claim was transmitted to the Court of Claims by the Secretary of the Interior, under section 1063, Revised Statutes.

Wozencraft's instructions did not extend to and embrace contracts for the subsistence of Indian tribes, but only authorized him, as such commissioner, to hold treaties with such Indians. The Court of Claims finds this as a fact (Finding II, Rec., 5).

An appropriation of $25,000 had been made by Congress and placed at the disposal of Wozencraft and the other two commissioners, for the purpose of holding treaties with such Indians.

On June 27, 1857, the Indian Office advised and instructed Wozencraft and his associate commissioners that when the $25,000 for holding treaties was exhausted, they should close all negotiations and proceed with their duties as agents simply, as the Department could not feel justified in authorizing anticipated expenditures beyond the amount of the appropriation made by Congress (see Finding V, Rec., 6).

Notwithstanding this instruction, which was received by Wozencraft September 2, 1851, the illegal contract was entered into with McDougall on April 5, 1852.

Inasmuch as the Court of Claims did not deliver an opinion, there is no guide in the record as to the conclusion of law, except the findings of fact. Reference is made to the former claims of the same kind, and we think it may be safely asserted that the conclusion of law rests upon *policy* rather than *law*.

ASSIGNMENT OF ERRORS.

It is assigned as error on behalf of the appellants as follows:

(1) Error of the Court of Claims in the conclusion of law reached upon the findings of fact.

(2) Error of the Court of Claims in rendering final judgment upon the findings of fact against the United States for the sum of $81,250.

(3) Error of the Court of Claims in not rendering final judgment for the United States and dismissing the case.

BRIEF OF ARGUMENT.

As the Court of Claims, in the eighth finding of fact, has referred to all claims similar to McDougall's, upon which Congress and said court have acted, we desire to call the attention of the Supreme Court to the history of each of these claims.

The action of the Court of Claims, and of Congress, concerning these claims may be stated as follows:

The first case presented to the Court of Claims was entitled *Samuel J. Hensley* vs. *The United States*. The contract appears to have been identical with McDougall's. The opinion of the court was transmitted to Congress February 3, 1859, and is in the appendix to this brief. The court found adversely to the claimant, and said: * * * "The United States are not legally liable upon the contract claimed upon, because it was not made by their authority, and has not been adopted by them." Con-

gress, however, passed an act appropriating the necessary amount and Hensley was paid in full (12 Stat. L., 842).

Samuel Norris likewise brought suit in the Court of Claims upon a similar contract, and the court recorded an adverse decision against him. Congress, by joint resolution, again referred the claim to the Court of Claims, with directions that the claimant should be paid the *actual value of the supplies furnished at the times and places of delivery*, under the contract upon which the former suit had depended (14 Stat. L., 608). Pursuant to the resolution the case was again tried, and judgment recorded for Norris for $69,900 (2 C. Cls. R., 155).

McDougall, the claimant's decedent, brought a suit on the identical contract upon which it is now sought to recover in the Court of Claims, which was decided adversely to him on the same day, February 3, 1859, and for the same reasons, that the Hensley case was so decided. The opinion is in the appendix to this brief. The case was then presented to Congress, and has been pending there and in the Interior Department until recently brought to this court.

Congress passed an act (10 Stat. L., 804) to pay John C. Frémont $183,850 for supplies furnished for the same purpose on similar contracts.

Jackson and others brought suit (1 C. Cls. R., 260) to recover on drafts issued by an Indian agent, on a similar contract, and directed to the Secretary of the Interior. The court found adversely to claimants, because such agent had no authority to draw bills of exchange so as to bind the Government, and for the further reason that the statute forbids the assignment of claims.

Up to this period none of the claims arising under these unauthorized contracts had been allowed by the court, and Congress alone granted relief to the claimants. In fact, Congress appropriated directly for the payment of the Frémont and Hensley claims, and referred the Norris claim to the court.

This was the condition of these claims, in the court and in Congress, when Frémont presented his petition to the court (2 C. Cls., 461), and entitled the case, Frémont, for the use of Jackson, and procured a further hearing of the claim formerly presented by Jackson and others (1 C. Cls. R., 260).

It will be observed that up to this time the Court of Claims has found against the claimants in all cases considered, except the Norris Case, in which there was an express authority from Congress to act.

At this juncture the court, in the *Frémont Case* (2 C. Cls. R., 261), departed from the rule which had been adhered to in these cases, and enunciated the following doctrine:

> A legislative recognition of the obligation of the Government may be inferred from Congress having appropriated subsequently money for the same purpose, and provided for the payment of other contractors similarly interested in the same class of transactions.

Hence the court *inferred* from the passage by Congress of three private acts that such claims assumed a new status in court, the old rule was departed from, and a new one adopted, which is quoted above, and the reasons therefor are elaborately stated in the opinion.

The Frémont and Roach Case is like the last case above

mentioned, and judgment was entered for the claimants (4 C. Cls. R., 252).

Next came the *Belt Case* (15 C. Cls., 92), in which the present Chief Justice reviewed the entire matter, and awarded the claimant a judgment.

The above is a history of the action of Congress, and of the decisions of the Court of Claims, in regard to this class of cases. We think there is great doubt about the soundness of the conclusions of law found by the Court of Claims.

In the case at bar no opinion was delivered, but it is fair to presume the conclusion of law is based upon what is stated and assumed to be law in the Frémont and Belt Cases. There has been no specific legislation by Congress in regard to appellee's claim, and those are the only cases decided in favor of claimants in the absence of legislation by Congress. The Frémont and Belt Cases were not appealed, and hence the question is for the first time presented to the Supreme Court whether what was treated as law in those cases is the law, and whether it supports the conclusion reached in this case upon the findings of fact.

In *Frémont's Case* (2 C. Cls. R., 461) the Court of Claims infers a ratification by Congress of the illegal and void contracts, like McDougall's, because appropriations were made by Congress to pay Frémont (10 Stat. L., p. 894), Hensley (12 Stat. L., p. 847), and because Norris's claim was referred by special act to the Court of Claims.

It was not the intention or purpose of Congress by the passage of the special act for the relief of Norris to ratify the illegal contract upon which he claimed, but on the

contrary the court was authorized to hear the same and award a judgment upon the *quantum calebant*.

It may be said that the above-named persons were favored by Congress, which undoubtedly was the case; that it was not the intention of Congress to so favor McDougall is equally plain, because his claim had been certified back to Congress by the Court of Claims, as then constituted, on the same day that Hensley's was so certified, and was before Congress at the time the special act for the relief of Hensley was passed. In fact, it was so pending in Congress when the Hensley, Frémont, and Norris special acts were each passed. But no reference was made in any manner to McDougall's claim.

In order to affirm the judgment of the Court of Claims in the case now under consideration, the Supreme Court must declare as sound law, that the passage by Congress of three special acts in regard to three individual claims is sufficient to establish a general principle of law, upon which it may be inferred that Congress intended to, and did thereby, ratify all illegal and void contracts similar in character to the illegal contracts of Frémont, Hensley, and Norris, in whose favor such legislation was procured. A very broad and unjustifiable inference, which establishes a dangerous precedent. Should *special legislation* thus be made the foundation for *general law?*

We submit, therefore, with all due respect, that the Court of Claims took upon itself some of the constitutional powers of Congress to make laws, when it *inferred* "a legislative recognition of the obligation of the Government" to pay claims like Frémont's, Belt's, and Mc-

Dougall's, and founded such inference upon three special acts, each having been passed for a *specific* and not for a *general* purpose.

The private acts in no way affected the public interest; hence they only affected the persons and claims expressly named therein, and had no affect upon third persons and their claims. Such private acts could not become public and general statutes otherwise than by recognition by a public statute as such. (Sedgwick's Stat. and Const. Law, pp. 33, 34, 678.)

In support of this proposition we quote from *United States* v. *Saunders* (22 Wall., 492), as follows:

> If its (the statute's) general purpose have plain reference to one class of persons, it will not include a single individual in a distinct class, though the mere words might include it.

It is not claimed that any general statute has been passed changing the character of the private statutes for the relief of Frémont, Hensley, and Norris into public statutes.

The inference of the Court of Claims, therefore, considered as a bare legal proposition, is not supported by law.

But has Congress, speaking through the reports of its committees or otherwise, ever done anything by which it can be said McDougall's illegal contract has been either inferentially or expressly ratified? We believe the Court of Claims has not declared the existence of an express ratification. Had such court the power to *infer* such ratification under any state of circumstances?

In *Frémont's Case* (2 C. Cls. R., 477–480) Chief-Justice Casey, who delivered the opinion of the court, incorpo-

rates into the opinion extracts from the reports of committees, which show conclusively it was not the intention of Congress to ratify McDougall's illegal contract, or such illegal contracts in a general way, but it is expressly stated that such contracts were made without authority of law. The committee say, for instance, in reporting *Frémont's Case* (*Ibid*, p. 478):

> *There was no express authority of law to make the contract*, and yet the general authority with which he was clothed to treat, coupled with the emergencies of the occasion, fully justified him in *assuming that the legislative and executive departments would sanction his purchase.* * * *

In the report of the House committee on Hensley's claim it is said (*ibid.*, 479):

> It is not necessary for the committee to express any opinion on the legal question upon which the decision of the Court of Claims turned. * * *

It will be observed that Congress and its committees directed attention in each instance to the individual claim under consideration, but at no time, either by legislation or reports of committees, intimated that the illegal contracts should be adopted or ratified by Congress. In fact the committee's report that the contracts, of which McDougall's is one, were made without authority of law. Yet the majority of the Court of Claims, in an opinion which is remarkable for its "narrative" of the case (*ib.*, 462–465), *infers* "a legislative recognition of the obligation of the Government" to pay such claims as McDougall's. Judge Loring dissented (*ib.*, 481) because there had been no special act of Congress, as in the Norris Case.

The *Belt Case* (15 C. Cls., 92) follows the Frémont Case in its rulings. These cases both contain more good history about the Indians of California than good law.

The reports of committees were all well guarded in their language, recognizing that Congress ought to pay the claims under consideration, but explicitly asserting such contracts were made without authority of law. McDougall's Case is one in which Congress may grant relief, either by special appropriation or by reference to the Court of Claims as in the Norris Case.

The agreement having been executed without authority is void, and could only become effective by a ratification by some proper officer or agent of the Government. Has such ratification been made? Wozencraft drew certain bills of exchange on the Commissioner of Indian Affairs in payment for the beef alleged to have been furnished; upon presentation to the drawee payment thereof was refused. The date of such presentation is not shown, but the presumption is that the bills were presented within a proper and reasonable time. This was the first opportuty afforded the Government of ratifying or rejecting the agreement. Ratification was refused in the most emphatic manner by refusing to accept or pay the bills of exchange.

The very first act on the part of the Government was to refuse payment of the amount claimed under the contract in suit, for the evident reason that such contract was irregular and void, and that no appropriation had been made by Congress for its payment.

The cause of action in this case is founded upon McDougall's illegal contract, and it is not sought to recover upon the *quantum valebant* as in the Norris case.

We respectfully submit that the findings of fact in this case do not support the conclusion of law upon which the final judgment was rendered, and ask that such judgment may be reversed.

A. H. GARLAND,
Attorney-General.
HEBER J. MAY,
Assistant Attorney.

APPENDIX.

IN THE COURT OF CLAIMS.

SAMUEL J. HENSLEY)
vs.
THE UNITED STATES.)

Opinion of the Court of Claims transmitted to Congress February 3, 1859. (H. R., Thirty-fifth Congress, second session. Rep. C. Cls. No. 189.)

LORING, Justice delivered the opinion of the court:

This is one of a class of cases pending before this court, and arising under contracts made by commissioners and Indian agents of the United States in the State of California. The action of these commissioners and agents in making the contracts, and the validity of the claims founded on them, have been in the argument of all of them rested in great measure upon the condition of the Indian country at the time the contracts were made, and thus that local history is a part of the evidence in this class of cases.

By act of Congress, September 28, 1850 (9 Stat. L., 519), the President was authorized to appoint three Indian agents for California.

And by act September 30, 1850 (9 Stat. L., 558), an appropriation of $25,000 was made "to enable the President *to hold treaties* with the various Indian tribes in the State of California."

Under the former act, Redick McKee, George W. Barbour, and O. M. Wozencraft were constituted, severally,

Indian agents in California, on October 10, 1850 (Senate Doc. 4, p. 7), but on the 15th of the same month their functions as Indian agents were suspended, and they were appointed "commissioners to hold treaties with various Indian tribes in the State of California, as provided in the act of Congress approved September 30, 1850 (Senate Doc. 4, p. 8).

By act of Congress, February 27, 1851 (§ 3, 9, Stat. L., 586), it was enacted that "hereafter all treaties with Indian tribes shall be negotiated by such officers and agents of the Indian Department as the President of the United States may designate for that purpose." Under this act the functions of Messrs. McKee, Barbour, and Wozencraft, as Indian agents in California, were revived, and as such they were "designated to negotiate with the Indians in California," under the instructions theretofore given them as commissioners (Senate Doc. 4, p. 14).

By letter dated October 15, 1850 (Senate Doc. 4, pp. 8, 9), the commissioners had been instructed as follows:

> As set forth in the law creating the commission and the letter of the Secretary of the Interior, the object of the Government is to obtain all the information it can with reference to tribes of Indians within the boundaries of California, their manners, habits, customs, and extent of civilization, and to make such treaties and compacts with them as may seem just and proper. On the arrival of Mr. McKee and Mr. Barbour in California they will notify Mr. Wozencraft of their readiness to enter upon the duties of the mission. The board will convene, and after obtaining whatever light may be within its reach, will determine upon such rule of action which will be most efficient in obtaining the desired object, which is by all possible means to conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties bind-

> ing on them towards the Government and each other. You will be able to judge whether it will be best for you to act in a body, or separately, in different parts of the Indian country.

It is observable that these instructions are very general, that they specify nothing but the objects of the Government, and that, emphatically repeating that object to be "to conciliate the good feelings" of the Indians, and to confirm those good feelings by permanent treaties, they leave it to the commissioners "to determine upon some rule of action which will be most efficient in attaining the desired object."

The reasons of the generality of these instructions, and the extent of the discretion vested in the commissioners, are illustrated by the preceding paragraph in the same letter:

> The Department is in possession of little or no information respecting the Indians in California, except what is contained in inclosed copies of papers, a list of which is appended to these instructions; but whether even these contain sufficient data to entitle them to full confidence will be for you to judge, and they are given to you merely as points of reference.

The generality of the instructions is pressed upon the attention of the Department in a letter dated December 6, 1850 (Senate Doc. 4, 52), in which Commissioner McKee states that the commissioners regret that their instructions from the Government "are so meager and indefinite, and throw upon them necessarily so much responsibility. In the absence of direct and positive instructions, or even counsel and advice, we must do the best we can, relying upon your approval of what we may do, based upon an honest desire to promote at once the best good of the Indians, while we maintain the honor and evince the benevolent designs of our Government towards the unfortunate aborigines."

Thus empowered and instructed, the commissioners entered upon their duties by convening and organizing at San Francisco, January 13, 1851, and after obtaining information from the governor of California, and from the members of its legislature, then in session at San José, they proceeded to the Indian country in California, and the condition of that country at this time makes a material fact in this class of cases. The discovery of gold had filled it with miners, whose sudden and extensive emigration had brought into collision the interests of the whites and the rights of the Indians. Difficulties of a serious character had arisen between them, and, beginning in the northern part of the State as early as June 6, 1850 (Senate Doc. 4, pp. 38, 52), had extended to its southern border (Senate Doc. 61, pp. 2, 3). Mr. Adam Johnston, in his official report as subagent, dated September 16, 1850 (Senate Doc. 4, p. 44), says of the Indians:

> They have an indefinite idea of their right to the soil, and they complain that the *pale faces* are overrunning their country and destroying their means of subsistence. The emigrations are trampling down and feeding their grass, and the miners are destroying their fish-dams. For this they claim some remuneration, not in money, for they know nothing of its value, but in the shape of clothing and food.

And on December 6, 1850 (Senate Doc. 4, p. 52), Commissioner McKee, quoting an informant, says:

> He informs me that the Indians on the waters of the Sacramento are in a very dissatisfied and unsettled state. Just before he left there was an outbreak, in which blood had been shed on both sides; and the next news from that quarter will probably announce increased disturbances, if not a general war, between the whites and Indians.

And in the same letter he thus continues:

> They were mustering volunteers at Sacramento City and at other points when my informant left, and bloody work was anticipated. What is to be the result of this state of things I cannot even conjecture. The Indians claim the country as their native soil, or hunting and fishing ground; and the whites want to explore it for gold, and, if they find the metal there, will insist on retaining its possession.

And in his letter of February 11, 1851 (Senate Doc. 4, pp. 54, 55), he says of the southern district:

> So many direct injuries have been inflicted on these Indians by the whites, and so many promises made of restitution and redress, all of which remain unfulfilled, that they have lost all confidence, and are now, we are told, fighting with desperation for their lives and their country. The whites have driven most of the southern tribes up into the mountains, from whence, as opportunities serve, they sally out into the valleys to steal and drive off the cattle and mules as the only alternative for starvation. Then comes up the cry of Indian depredations, invasion, murders, and the absolute necessity for exterminating the whole race.

And generally the details of the evidence submitted to the court (Senate Doc. 4, pp. 58, 60, 61, 62, 64, 65, 66, 71, 72, 81, 82, 83, 85, 89, 109, 113, 115), confirm the information given to the commissioners, and of which the summary is reported to by them (Senate Doc. 4, p. 56), that hostilities of a deadly character existed between the Indians and whites in different portions of the State, threatening, indeed, *a general border war*.

And the state of the Indian country when the commissioners began their labor in it is clearly shown by the fact that the troops of California were in the field engaged in

actual hostilities with Indian tribes (Senate Doc. 4, p. 71), and by the instruction to the commissioners May 9, 1851 (Senate Doc. 4, p. 15), in which the Commissioner of Indian Affairs says:

> I have been informed that it is deemed necessary by the War Department to commence active military operations against the Indians in California, and in that event it will be highly important that one or more of the agents shall accompany each detachment of the troops sent against them, so as to be in readiness to act in the capacity of negotiators should occasion require. What particular negotiations may be required, it is impossible for this office to forsee, nor can it give any specific directions on the subject. Much must be left to the discretion of those to whom the business is immediately intrusted.

In this state of things the commissioners adopted the measure of bringing the Indians from their homes in the mountains and mining regions and placing them on reservations made for them by the commissioners from the unoccupied lands in the plains, and they proceeded to enter into treaties with the Indians, in which their removal into the reservations was made an indispensable condition, and their subsistence there was provided for for the years 1851 and 1852. In the report of the commissioners, dated March 25, 1851 (Senate Doc. 4, pp. 69, 70), in detailing their proceedings in the formation of the first treaty which they made, they say:

> After submitting our propositions to them we desired them to retire and consult among themselves upon the terms that we had proposed, and in an hour we would again meet them and learn their decision, as well as hear propositions from them, if they desired to make any. When we again met them they expressed themselves satisfied with the terms we, of-

> fered, except their removal from the mountain fastnesses to the plains immediately at the foot of the mountains. We then explained to them the necessity of such a removal and location, and *that we could treat with them upon no other condition*, believing that, if they were to remain in the mountains, constant conflicts between the Indians and miners would take place; that the Indians could not, nor would they attempt to support themselves otherwise than by stealing horses, mules, and cattle from the farmers in the plains, and by depredating upon small parties of miners in the mountains. After we had explained these matters fully to them they again consulted together, and finally agreed to remove their families to the plains, as we desired.

And the proceedings and purposes of the commissioners are succinctly stated by Commissioner Barbour (Senate Doc. 61, p. 2) when, after describing the strife between the Indians and the whites, he says:

> Under such circumstances the commissioners undertook to effect a reconciliation and carry out the plan agreed upon for treating with the Indians. Treaties were, with much trouble and delay, made by the joint board of commissioners with several tribes, with the terms of which you were in due time made acquainted. A very important feature in these treaties, and one, too, without which no treaty could have been made with the Indians, was the supply of an agreed amount of beef and flour to aid in the subsistence of the Indians treated with during the years 1851 and 1852. Without some such provision the commissioners, as well as every intelligent man in California, knew that no treaty made with these Indians would be observed by them. Necessity as well as inclination would compel them to steal from the whites animals on which to subsist, as, in a large ma-

jority of cases, the stores of acorns laid up by them had been destroyed by the whites. The commissioners therefore, urged by the calls of humanity and the voice of the whole country, could do nothing less than agree to furnish the provisions stipulated in the different treaties.

And the policy of the commissioners is stated by Commissioner Wozencraft, May 14, 1851 (Senate Doc 4, pp. 82, 83):

> You have been advised of the policy which we have deemed expedient to adopt; permit me to say a few words in relation to it. The common and favorite place of abode of the Indians of this country was in the valleys and within the range of mountains; the greater portion were located and had resided, as long as their recollections and traditions went, on the grounds *now being turned up for gold*, and now occupied by the gold hunters, by whom they have been displaced and driven higher up in the range of mountains, leaving their fisheries and acorn grounds behind.
>
> They have been patient in endurance, until necessity taught them her lesson, which they were not slow to learn (as it is measurably intuition with the Indian), and thus they adopt from necessity what was deemed a virtue among the Spartans; and the result is, we have had *an incipient border war*, many lives have been lost, an incalculable amount of property stolen, and the development and settlement of the country much retarded; and this will ever remain unavoidable so long as they are compelled or permitted to remain in the mountains. They can come down in small marauding parties by night and sweep off the stock of the miners and farmers, and before the loss is known they will be beyond pursuit; and I venture the assertion that this would be the case in defiance of all the troops that could be kept here.

> Our policy is, as you have been informed, to get them down from their mountain fastnesses and place them in reservations along in the foot-hills bordering on the plains; the miners will then be between them and the mountains, making a formidable cordon, or barrier, through which it would be difficult to take their families unobserved; and in those reservations there will be no place for concealing stolen stock, and they can there have all the protection which can and should be afforded them against their persecutors; and lastly, they will there learn the ways of civilization, and thereby become useful members in the community instead of being ——

In pursuance of this policy the commissioners acted jointly until May 1, 1851 (Senate Doc. 4, 74), and thereafter severally, in forming the treaties under which the claim I read before the court has arisen.

All treaties made by the commissioners, jointly or severally, contained the stipulations that the Indians should remove from their mountains into the reservations upon the plains (Senate Doc. 4, pp. 128, 138), and should there receive specified amounts of provision for each of the years 1851, 1852; and, as we have seen, this was the policy adopted by the commissioners, and by them reported to the Department in the beginning of their proceedings. (Senate Doc. 4, pp. 128, 138.)

On May 22, 1851, the Commissioner of Indian Affairs addresses the commissioners officially, thus:

> GENTLEMEN: Your letters of March 5 and 25, 1851, the last inclosing a copy of a treaty entered into with the chief captains and headmen of six tribes of Indians in California, and one from Agent McKee of March 24, 1851, have been received.
>
> The Department fully appreciates the difficulties with which you have had to contend in executing the important trust confided to you, and is highly

gratified with the results thus far achieved, especially with your energy and dispatch in procuring a location for several tribes of Indians, and promptly removing them to it.

The provisions of the treaty, a copy of which is acknowledged above, are approved of.

Under the treaties the Indians were removed onto the reservations. (Senate Doc. 4, pp. 70, 252.) The land of these reservations was poor in quality, uncultivated, and stinted in natural productions, and it was a necessary consequence of such removal of the Indians that they should be supplied with food.

Mr. Wozencraft says (Senate Doc. 4, p. 83):

> The country set apart for them is very poor soil; only a small part of it is adapted to agricultural purposes.

Mr. Johnston says (Senate Doc. 4, p. 105):

> On the breaking out of the war in December last, the Indians returned to the mountains, leaving behind them their principal stores of subsistence, intending to return for them as necessity required. The whites in pursuit of them burned and destroyed all that fell in their way; consequently, at the time the different treaties were entered into the Indians of this region were destitute of anything to subsist upon, even if left to range at liberty over their native hills. Under each treaty they were required to come from the mountains to their reservations on the plains at the base of the foot-hills. They were but children of nature, ignorant of the arts of agriculture, and incapable of producing anything if they had been placed on the best soil of the earth. They came from the mountains without food, depending on the small amount allowed in their treaties, with the roots and seeds to be daily gathered by their females; these have been found wholly inadequate to their necessities.

Again Mr. Johnston says (Senate Doc. 4, p. 244):

> In none of these reservations is there any agricultural land, except in spots; a few acres only can be found together, and those upon the banks of the streams.

And Superintendent Beale says (Doc. 4, p. 325):

> With reference to the character or quality of the land reserved by the treaties for the Indians, I can only speak from personal observation with regard to those selected in the southern portion of the State. They are such as only a half-starved and defenseless people would have consented to receive, and, as a general thing, they embrace only such lands as are unfit for mining or agricultural purposes.

And Commissioner McKee (Senate Doc. 4, p. 249) says:

> In my judgment there are not more than two or three out of the whole number of reservations which any practical man or company would purchase, *as a whole*, at even 1 cent per acre, subject to State and county taxes. Still we have endeavored to include in every such selection some good land capable of subsisting the Indians; and it would have been a wretched policy, as well as gross injustice, to have done otherwise. Our object had been to give them lands which they could work, and upon the product subsist, after two or three years, during which the Government would aid them by supplies of food, clothing, &c.

The effect of the removal of the Indians onto the reservation was to put an end to the strife in the Indian country, which threatened a general Indian war, and to secure to the miners the peaceable possession of extensive and valuable mining districts.

Mr. Johnston says of the Indians, December 3, 1851 (Senate Doc. 61, p. 12):

> Those with whom treaties have been entered into, residing in any agency upon the San Joaquin, Fresno, Mercedes, and Tuolumne and Stanislaus Rivers, have been seemingly quiet and contented since I have been supplying them with food.

And Commissioner Barbour says of the same Indians:

> They occupied the country about the headwaters of the Tuolumne, Mercedes, and Mariposa Rivers, embracing some of the richest gold mines of the State, from the most of which they had driven the miners, killing many of them, and having driven off and destroyed a large number of horses, mules, and beef cattle. By the terms of the treaty they surrendered all claims to this extensive rich mineral region, and accepted a tract of country allotted to them between the Tuolumne and Mercedes Rivers, to which they removed shortly after the treaty, and where they were living quietly and contentedly, and doing well when I last saw them, in the month of September, 1851.

And of the Indians treated with April 29, 1851, he says (Senate Doc. 4, p. 252):

> The Indians treated with on this occasion inhabited the country on the Mariposa, Chouchilla, Fresno, Upper San Joaquin, and King's Rivers, embracing a very large extent of the richest gold region in the State, from which they had driven the miners, after killing many of them and destroying their property. They, by this treaty, surrendered their title to hundreds of miles of country rich in gold, and accepted a district of country specified in the treaty sufficient for their purposes, and well adapted to their wants. Shortly after the treaty they all removed to and set-

> tled in the district of country allotted to them, and were working industriously, doing well, and living contentedly in their new home when I left them in September last (1851).

Mr. Wozencraft says, December 1, 1851 (Senate Doc. 4, p. 229): "The Indians throughout my district are quiet and peaceable." And again May 20, 1852: "The Indians throughout my district are quiet and peaceable except some few thefts;" and (Senate Doc. 61, p. 24) gives Doctor Rejois's statement: "The Indians in good faith have come from the mountains, given up their mines and hunting grounds to the miners, and are desirous of learning from the white man the customs of civilized life."

By Senate Document 4 (pp. 268, 326), it appears that the treaties made by the commissioners were submitted by the Commissioner of Indian Affairs to Lieut. Edward F. Beale, with directions to report "his views as to the merits" of the treaties. In his report he says:

> With reference to my views as to the merits of the treaties, I state that I regard the general line of policy pursued by the commissioners and agents in negotiating with the Indians as proper and expedient under the circumstances. My own personal knowledge and experience in Indian affaires, and particularly in reference to the tribes within the State of California, incline me to the opinion that to secure their peace and friend-ship no other course of policy, however studied and labored it may have been, could have so readily and effectually secured the object in view.

But it is observable that this commendation applies only to the general line of policy adopted by the commissioners, viz: The removal of the Indians to reservations and their temporary supply three with subsistence; and it is not to be extended to the terms of any particular con-

tract for supplies or the circumstances of its execution. (Senate Doc. 57, p. 2; Senate Doc. 4, p. 366.)

Congress appropriated by act of September 30, 1850 (Stat. L., 9th vol., p. 558, ch. 91), to enable the President to hold treaties with the various Indian tribes in the State of California, $25,000. And by the act of February 27, 1851 (Stat. L., 9th vol., p. 572, ch. 12): "For expense of holding treaties with the various tribes of Indians in California, in addition to the appropriation of the thirtieth of September, eighteen hundred and fifty, twenty-five thousand dollars."

The amount of these appropriations ($50,000) was by the acts themselves applicable to *the holding* of treaties, and to no other purpose. It had no reference to expenditures incurred in the fulfillment of treaty stipulations, and was not therefore applicable to the contracts claimed upon; and the commissioners were instructed by the Department in its dispatch of June 25, 1851 (Senate Doc. 4, p. 17), which informed them of the remittance of the appropriation last made, that articles delivered under the treaties must be provided for by future appropriations.

By instructions from the Department, dated June 27, 1851 (Senate Doc. 4, pp. 17, 18), the commissioners were informed that the amount of the appropriation stated above ($50,000) was all that was applicable to *the negotiation* of treaties in California, and were instructed, "when the funds referred to have been exhausted you will close *negotiations*, and proceed with the discharge of your duties as agents simply, as the Department could not feel justified in authorizing anticipated expenditures beyond the amount of appropriations made by Congress."

These instructions prohibited the commissioners from negotiating or entering into treaties after the appropriations were exhausted, but they had no reference whatever to the action of the commissioners under treaties made before the appropriations were exhausted.

All the treaties made by the commissioners were rejected by the Senate.

The Statute of August 30, 1852 (10 Stat. L., p. 56), appropriated—

> For the preservation of peace with those Indians who have been dispossessed of their lands in California until permanent arrangements be made for their future settlement, the sum of one hundred thousand dollars: *Provided*, That nothing herein contained shall be so construed as to imply an obligation on the part of the United States to feed and support the Indians who have been dispossessed of their lands in California.

And by the act of March 3, 1853, the President was authorized to make five military reservations from the public domain in the State of California, and the sum of $250,000 was appropriated to defray the expense of subsisting Indians in California, and removing them *to said reservations* for protection.

And the annual appropriation acts of 1854, '55, '56, '57, '58, contained similar provisions for concluding the removal and continuing the subsistence of the Indians.

* * * * *

We are of opinion that the case must be decided on considerations common to the class of cases to which it has been said it belongs, and irrespective of its peculiar circumstances or merit; and that in this case, as in each of its class, the question is whether the contract claimed upon is the contract of the United States, as made or adopted by their authority.

The whole authority of the commissioners *as such* was "to hold treaties with various Indian tribes in the State of California," and the meaning of "the terms to *hold treaties*" is clearly defined and precisely limited by the provisions of the Constitution and the uniform practice under it, by which the Executive is authorized to mold the terms of

treaties, while the consent of the Senate is necessary to give them the sanction of law, authorizing action under them. It is entirely clear upon the evidence that the contracts claimed upon were made, and the supplies claimed under the contracts were furnished months after the treaties to which they are referred had been agreed upon and reduced to writing and signed, and their formal execution as mere documents completed; and with such execution the holding of the treaties was necessarily and entirely fulfilled, and the functions of the commissioners under the terms of their commission were determined, and for any further action on their part there was no authority in the words of their commission.

It was held that the treaties could not have been held or made without stipulations for these supplies of provisions in aid of the subsistence of the Indians. But the evidence does not show this; on the other hand, it tends to show that the Indians were willing to enter into treaties, but were unwilling to remove from their homes into the reservations, and it was only their removal which made the stipulations of their supplies necessary. In the report of the commissioners, dated March 28, 1851 (Senate Doc. 4, pp. 69, 70), in describing the course of their negotiations with the Indians, they state: "When we again met them, they expressed themselves satisfied with the terms we offered, except their removal from their mountain fastnesses to the plains immediately at the foot of the mountains. We then explained to them the necessity of such a removal and location, and that we could treat with them on no other condition, believing that, if they were permitted to remain in the mountains, constant conflicts between the Indians and whites would take place." This official report, made at the time of the transactions, is the best evidence of their circumstances and purpose. Besides this removal of the Indians on to reservations was the policy of the commissioners agreed upon and adopted on consultation by them before negotiating with the Indians,

and before they entered the Indian country (Senate Doc. 4, pp. 50, 60, 63; Doc. 61, p. 2). And it was suggested to the Department by Commissioner McKee (Doc. 4, p. 53) as early as December 1, 1850, and more than three months before any treaty was made or proffered. And all this tends to show that the removal of the Indians to the reservations was a condition enforced upon them by the commissioners, and that with the Indians it was not a requirement, but an objection, in the treaties made.

Then it is said that the Department approved the policy of the commissioners in removing the Indians to the reservations, and thereby adopted the act and its direct consequence of furnishing them with provisions there. (Doc. 4, pp. 15, 20.) And thus the question is, whether it was in the power of the Executive, under all the circumstances of the case, to authorize or adopt these contracts.

Under the clause in the Constitution which authorizes the President to make treaties, the power of the President is like that of the commissioners here, to *hold treaties* only, and the Executive, therefore, had no more authority than the commissioners to carry those treaties into execution before their ratification by the advice and consent of the Senate.

The circumstances of the case are claimed to be, that a strife, destructive of life and property and threatening the peace of the country, was raging in the State of California, and the question is, whether to end this strife by separating the parties to it, the Executive could use the means these commissioners used, of *pledging the credit of the United States*.

The Constitution gives to the Executive no such terms, and the provisions and purpose of the Constitution preclude its implication. The power in the Executive to pledge the credit of the country would render nugatory the provision of the Constitution that "no money shall be drawn from the Treasury but in consequence of appropriation made by law," and would baffle the extended pur-

poses of that provision. The power, if implied to any degree, must be to every degree, and would place the resources of the country at the disposal of the Executive, and this would change the operation of the Government, which the Constitution expressly makes. Admitting, therefore, all the plaintiff's claim, that the Department charged with the management of Indian affairs approved the policy of the commissioners, and adopted its consequences, yet that gave to the commissioners no power to pledge the credit of the United States. Such a power belongs exclusively to the Congress of the United States.

But the commissioners were also Indian agents, and it is claimed that the power to make these contracts was, under the circumstances, within their official authority as Indian agents.

The statute of the United States, June 30, 1834 (Stat. L., vol. 4, p. 757, sec. 7), enacts as follows:

> And it shall be the general duty of Indian agents and subagents to manage and superintend the intercourse with the Indians within their respective agencies, agreeably to law, to obey all legal instructions given to them by the Secretary of War, the Commissioner of Indian Affairs, or the superintendent of Indian affairs, and to carry into effect such regulations as may be presented by the President.

The general terms "to manage and superintend the intercourse with the Indians," &c., cannot, in this statute, be construed to involve the power to make any purchases for or on account of the Indians, because that subject is specifically provided for, in all cases contemplated by the statute, in the thirteenth section, which appoints specific agencies for the purpose of making purchases, and, to guard against frauds, makes express and careful provisions for the delivery of all articles purchased, and these specific agencies, and the plain purposes of the thirteenth section, would be rendered nugatory by construing that the power to make purchases and distribute articles pur-

chased was involved in the general terms of the seventh section, to "manage and superintend intercourse with the Indians."

It may be that the cases in which these contracts were made were not contemplated in the thirteenth section, and that therefore they may not be directly within its provisions; but there is nothing to show that they were contemplated in the seventh section. And if the general terms "manage and superintend intercourse with the Indians" do not include power to make purchases for the Indians in cases contemplated in the statute, they cannot be construed, of their own force, to involve such power in cases not contemplated by the statute.

By the remaining clause of the seventh section, the agents and subagents are "to obey all legal instructions given to them by the Secretary of War, the Commissioner of Indian Affairs, or the superintendent of Indian affairs, and to carry into effect such regulations as may be prescribed by the President." But if there is no power in the Executive to pledge or dispose of the credit of the United States, no regulations or instructions from any of the executive officers mentioned in this section of the statute, and no rules of the Indian Bureau could authorize agents or subagents to make these contracts.

It is claimed that the contract in this case has been affirmed by Congress, and appropriations made for its payment, in the act of August 30, 1852, and subsequent appropriation acts.

In the act of 1852, all that relates to California is in these words:

> For the preservation of peace with the Indians who have been dispossessed of their lands in California, until permanent arrangements be made for their future settlement, the sum of one hundred thousand dollars: *Provided*, That nothing herein contained shall be so construed as to imply an obligation on the part of the United States to feed and support the In-

dians who have been dispossessed of their land in California.

The argument for the petitioner is, that this statute was intended to provide for obligations of the United States "to feed and support the Indians *in* 1852;" the proviso expressly declares no such obligation shall be implied from the act. Then the statute denotes in terms the period to which its appropriation is to be applied. It speaks, of course, from its date, August 30, 1852, and says its provision is for the preservation of peace *until* the *future* settlement of the Indians, and is thus on its face prospective merely.

The act of 1853 authorized *new reservations* for the Indians, and then provided means for their removal to these new reservations and for their subsistence there; and the subsequent acts are all expressly in continuance of the same measures. And from all the acts and the evidence in the case the conclusion is that the United States rejected the treaties and repudiated the reservations and measures of the commissioners and substituted other reservations and measures, and provided for them, and for them only.

Then it is said that the United States have surveyed and assumed title over the lands ceded by the Indians in the treaties made by the commissioners, and thus substantially affirmed the treaties. It is enough to say that it is a part of the case that all those treaties were rejected by the Senate, and never came into existence as a means of title or of claim of title; and whatever may have been the action of the United States, there is no reason shown for referring it to any claim of title founded on those rejected treaties.

It is argued for the petitioner that the relation of the United States to the Indians was analogous to that of guardian and ward at the common law, and that the supplies furnished to the Indians were thus in performance of legal obligations of the United States. If the analogy could be sustained, the argument founded on it was answered at the bar, that the obligation of a guardian was

only to supply the ward's means to his support and not to furnish means. But the analogy does not exist, for the relation of guardian and ward is a personal relation and cannot exist between nations, whose relations are by treaty and compact between themselves. The liability of a guardian for his ward's support rests on the fact that he holds all the ward's means of support. But the United States were not entitled to the rents or profits of the lands or the goods and chattels of the Indian tribes or nations in California.

And upon the whole case we are of opinion that the United States are not legally liable upon the contract claimed upon, because it was not made by their authority, and has not been adopted by them.

Our decision is, that the petitioner has not established a title to the relief he prays for.

Opinion of the Court of Claims, transmitted to Congress February 3, 1859, in the case of George McDougal.

George McDougal claims, upon a contract made with him by M. O. Wozencraft, on the part of the United States, in May, 1852, for supplies of beef to be furnished to the Indians in the lower part or southern agency of the State of California, at 12½ cents per pound, if paid for at the then ensuing session of Congress; if not then, at 15½ cents per pound, payment to be made by bills drawn by M. O. Wozencraft on the Indian Bureau or Secretary of the Interior at Washington.

The petitioner then alleged that under this contract 650,000 pounds of beef were furnished and delivered by him to M. O. Wozencraft, for which that gentlemen drew bills on the Department, first, for $81,250, the price of the beef at 12½ cents per pound, and afterward for $1,900 more to make up the price at 15 cents per pound, all of which bills the Department refused to pay.

From the evidence (the receipts of Ruckel and Hutchinson prefixed to Mr. Wozencraft's deposition, taken 3d of April, 1856), it appears that the beef is claimed as fur-

nished to Cow-we-has, San Louis, and Dieganian Indians. But Mr. Wozencraft's report to the Department (Doc. 4, pp. 285–288) shows that the treaty with those Indians was made after 25th December, 1851, and therefore after Mr. Wozencraft knew (as appears by his letter December 1, 1851, Doc. 4, pp. 229, 230), that the appropriation of $50,000 had been exhausted, and that consequently his power "to hold treaties" was annulled by the instructions from the Department, dated June 27, 1850, which he had received September 2, 1850 (Doc. 4, p. 180). So that treaty, for the fulfillment of which these supplies are claimed, was made against the most explicit instructions.

The evidence of the delivery of the beef under the contract is:

(1) Mr. Wozencraft's receipt (Exhibit X, prefixed to his deposition of April 3, 1856) of 650,000 pounds of beef, at $81,250; and his answer to the twelfth direct interrogatory in his deposition marked O. M. W., No. 1. But the force of this testimony is entirely destroyed by his answer to the fourth cross-interrogatory in that deposition, to the effect that he had no personal knowledge of the delivery, and by his answers to Lieutenant Beale (Doc. 4, p. 368).

The other evidence of the delivery of the beef is a receipt of Ruckel and Hutchinson (Exhibit Z) as follows:

> LOS ANGELOS; *May* 17, 1852.
>
> Received of George McDougal, the contracting party for supplying the Cow-we-has, San Louis, and Dieganian tribes of Indians with beef cattle, one thousand head of cattle, averaging six hundred and fifty pounds weight each.
>
> J. S. RUCKEL,
> *U. S. Indian trader for the San Louis and Dieganian Indians.*
>
> STEPHEN HUTCHINSON,
> *U. S. Indian trader for the Cow-he-was tribe of Indians.*

As the testimony of witnesses, this receipt is not evidence, for it is not testimony under oath. And as an admission it is not efficient, for there is no evidence in the case that Ruckel and Hutchinson were authorized to receive or receipt for the beef for the United States; and there is nothing in the case from which this can be inferred, except that Mr. Wozencraft, in 1856, four years after the transaction, verifies their signatures, and *does no more*.

By the receipt Ruckel and Hutchinson are traders for different tribes, yet the receipt does not exhibit any appropriation or quotas for these tribes, but purports that these traders, jointly, received the whole quantity of beef claimed for, 650,000 pounds, at one time, May 17, 1852; while Mr. Wozencraft's report, June 23, 1852 (Doc. 4, 339), shows that McDougal was then delivering the beef under this contract.

The receipt also states that the delivery was of "one thousand head of cattle, averaging six hundred and fifty pounds weight each;" while other evidence tends to show that the average weight of cattle in California did not exceed 500 pounds weight each, on the largest estimate (Doc. 61, pp. 6, 11, 17; Doc. 4, p. 341).

Then the petitioner in his petition and evidence (Exhibit X) sets forth a receipt given by him to Mr. Wozencraft, thus:

> Received, San Francisco, May 26th, 1852, of O. M. Wozencraft, United States Indian agent, eighty-one thousand two hundred and fifty dollars ($81,250) in full by drafts on the Indian Bureau for the above account.
>
> GEORGE McDOUGAL.

By this document the "account" was settled by the bills given for it, and by the arrangement between the parties those bills or drafts were to be the ground of claim. They were negotiable, for they were payable to Mr. Mc-

Dougal's order (petition, p. 3), and their negotiation by him would transfer his interest in the claim. The bills are not produced, nor are they accounted for, except by the averment (petition, 5), "that he is the sole owner thereof," and of this averment there is no proof.

This case is the same in principle as the case of Samuel J. Hensley, heretofore decided by this court, and for the reasons and considerations therein stated we are of opinion that the petitioner is not entitled to the relief he prays for.

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In the Supreme Court of the United States.

UNITED STATES, APPELLANTS,
vs.
JOHN PAUL JONES, ADMINISTRATOR,
appellee.
} No. 1024.

MOTION TO DISMISS APPEAL.

BRIEF OF ARGUMENT FOR APPELLANTS.

In the Supreme Court of the United States.

UNITED STATES, APPELLANTS,
vs.
JOHN PAUL JONES, ADMINISTRATOR, appellee.
No. 1024.

MOTION TO DISMISS APPEAL.

BRIEF OF ARGUMENT FOR APPELLANTS.

Two causes are presented in the motion of appellee why the appeal in this case should be dismissed for want of jurisdiction, and they will be considered in the order in which they appear in the motion:

> First. Because said court is without jurisdiction to hear and determine said appeal.

In support of this proposition counsel for appellee argues that recent legislation has divested the Supreme Court of the United States of appellate jurisdiction over cases tried and determined in the Court of Claims.

By section 14, act of March 3, 1863 (12 Stat. L., 768), it was provided:

> That no money should be paid out of the Treasury for any claim passed upon by the Court of Claims till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.

The case of *Gordon* vs. *United States* (2 Wall., 561) was dismissed for want of jurisdiction at December term, 1864, without an opinion, Justices Miller and Field dissenting.

In consequence of the decision of the Supreme Court in *Gordon's Case*, Congress, in order to confer appellate jurisdiction on the Supreme Court from final judgments and decrees of the Court of Claims, repealed section 14 of the act of March 3, 1863, and enacted that—

> From the final judgment, or decree, in all cases heretofore decided by the Court of Claims, of the character mentioned in the fifth section of said act of March third, eighteen hundred and sixty-three, an appeal shall be allowed to the Supreme Court of the United States, at any time within ninety days, after the passage of this act, except in such cases where the amounts found due by said court have been paid at the Treasury. (14 Stat. L., 9.)

The fifth section of the Act of March 3, 1863, reads as follows:

> * * * That either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds $3,000, under such regulations as the said Supreme Court may direct: *Provided*, That such appeal shall be taken within ninety days after the rendition of such judgment or decree: *And provided further*, That when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the Government in the adjustment of such class of cases or a Constitutional question, and such facts shall be certified to by the presiding justice of the Court of

> Claims, the Supreme Court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy. (12 Stat. L., 766.)

The Supreme Court then established rules governing appeals from the Court of Claims, which are published on pages 7 and 8 of 3 Wallace.

Under the acts of Congress, and the rules, as they then stood, the Supreme Court took appellate jurisdiction and decided the case of De Groot on appeal from the Court of Claims, and has entertained such jurisdiction of all such appeals thereunder to the present time.

The provisions of the Act of March 3, 1863, above quoted, are substantially embodied in the Revised Statutes as sections 707 and 708, and a list of cases is given in the notes to the respective sections, in which jurisdiction has been entertained on appeal.

The amount in controversy in the case at bar exceeds $3,000, and the case is therefore appealable under the law.

The Supreme Court may not have been asked, since the *Gordon Case*, to pass directly upon the question of its appellate jurisdiction from judgments and decrees of the Court of Claims, but it has incidentally defined such jurisdiction since the enactment by Congress of *all* legislation upon the subject.

In *United States* vs. *Young* (94 U. S., 258), Mr. Chief-Justice Waite said in relation to such jurisdiction:

> We have only such appellate jurisdiction as has been conferred by Congress, and in the exercise of such as has been conferred we can proceed only in the manner which the law prescribes. (*Barry* v. *Mercein*, 5 How., 119; *Durousseau* v. *United States*, 6 Cranch,

314; *United States* v. *Curry*, 6 How., 113; *Ex Parte Vallandigham*, 1 Wall, 251.)

From the judgments of the Court of Claims appeals are allowed to this court (sec. 707, Rev. Stat.), but no provision has been made for writs of error.

The decision in *Young's Case* was delivered at the October term, 1876, and the latest reference made by appellee in his brief to legislation on this subject is to the Act March 3, 1875. So the Supreme Court has, in the face of all legislation upon the subject, declared its appellate jurisdiction over final judgments of the Court of Claims.

In *Langford* v. *United States* (101 U. S., 344), cited in appellee's brief in connection with *Gordon's Case*, the court say:

> Congress, in establishing a court in which the United States may primarily be sued as defendants proceeded slowly and with great caution. As at first organized, the Court of Claims was merely an auditing board, authorized to pass upon claims submitted to it and report to the Secretary of the Treasury. He submitted to Congress such confirmed claims as he approved, with an estimate for their insertion in the proper appropriation bill. *Such as he disapproved demanded no further action.*
>
> It was by reason of that feature of the law that this court refused to exercise the appellate jurisdiction over awards of that court which the act of Congress attempted to confer, because the court was of opinion that the so-called Court of Claims was not, in the constitutional sense, a court which could render valid judgments, and because there could be no appeal from the Supreme Court to the Secretary of the Treasury. (*Gordon* v. *United States*, 2 Wall., 561.) *An act of Congress removing this objectionable*

feature having passed a year after that decision, the appellate power of this court has been exercised ever since.

This decision was rendered at the October term, 1879.

Upon the question of appellate jurisdiction from judgments of the Court of Claims, *vide Vigo's Case; Ex Parte United States*, 21 Wall., 648; *United States* v. *Alire*, 6 Wall., 573; *Ex Parte Zellner*, 9 Wall., 244.

The Supréme Court has entertained appellate jurisdiction from judgments of the Court of Claims in so many cases, and for so many years, that the rule of *stare decisis* may with propriety be applied to the case at bar.

We fail to see how section 236 of the Revised Statutes can materially affect the question under consideration. It simply requires that all claims and demands in which the United States are interested, either as debtors or creditors, shall be *settled and adjusted in the Department of the Treasury*. The words "*settled and adjusted*" are used synonymously, and mean that claims and demands in which the Government is interested must be settled according to the regulations systematically adopted in the Treasury Department, or provided for by law. A judgment of the Court of Claims may have to pass through the hands of certain officials of the Treasury Department for clerical purposes, such as entering it in the proper records and charging it to the proper fund or account. This no doubt is just what is meant by adjustment and settlement. But it cannot be seriously urged that this confers on the Treasury officials any authority to increase, diminish, or revise a judgment of the Court of Claims. The language of the statute would have to be very much distorted to say it

confers on such Treasury officials power of supervision over judgments of the Court of Claims.

The *Act of March* 3, 1875 (Supp. Rev. Stat., 185, 186), is relied on by appellee. It reads as follows:

> That when any final judgment recovered against the United States, or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-off, and discharges his judgment or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States.
>
> But if such plaintiff or claimant denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment or claim as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment.
>
> And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch.
>
> And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Secretary with 6 per cent. interest thereon for the time it has been withheld from the plaintiff.

This is merely a statutory application, so far as the Government is concerned, of the law of set-off. It simply places the United States in the same position that individuals occupy under the law under similar circumstances. It is optional with the Attorney-General whether he pleads a set-off or not, just as it is in suits between individuals. If, for any reason, set-off is not pleaded, the law authorizes the Secretary of the Treasury, when a judgment is presented and payment demanded, to deduct from the amount thereof any indebtedness of the judgment claimant to the Government. But if such judgment claimant denies the indebtedness, and refuses to consent to such deduction, a sufficient sum is retained on such judgment to make the Government's claim safe until the matter of such indebtedness can be determined by legal proceedings, which are required to be instituted by the Untited States immediately.

It is clear, therefore, that the Treasury officials have no power to review a judgment of the Court of Claims. They must fully recognize the force of such a judgment, and pay every dollar found therein in favor of the claimant. Their duties, as to the manner of payment of such judgment, are specially prescribed by law, are ministerial in character, and may be enforced, upon their refusal to discharge them, by writ of mandamus. Such duties do not, in the remotest manner, enter into or affect the validity and force of such judgment, but such officials are only required to proceed according to certain legal requirements in the payment of the same, without interposing any doubt or question as to its force, effect, and validity.

The final judgment of the Court of Claims is not thereby reviewed, increased, or diminished, but it is recognized and paid according to law in the Treasury Department. The officials of the Treasury Department have nothing to do with *determining the validity of the judgment*, but are regulated by law *as to its payment only*. They do not exercise supervisory powers over the *judgment*, but have such power over its *payment*. If they had the power of supervision and review contended for by appellee, it would not be necessary to resort to a court to determine the judgment-claimant's indebtedness to the United States.

Proceedings under the Act of March 3, 1875, quoted above, as provided therein, are not instituted for the purpose of subjecting the judgment of the Court of Claims, or of the Supreme Court on affirmance, to review or change by other courts, whether inferior or not, but for the purpose of determining the indebtedness of the judgment-claimant to the United States, in a matter not determined by the Court of Claims, or Supreme Court, as the case may be, when such final judgment was rendered, because the plea of set-off had not been interposed. As before stated, the Attorney-General is not compelled to answer by way of set-off. He may do so at his option. In many instances, no doubt, set-off accrues subsequently to the rendering of the final judgment.

We repeat, the Secretary of the Treasury has no power over final judgments of any court; it is his duty simply to pay them according to law; nor has any other court such power, when called upon to determine the indebtedness of a judgment claimant to the United States. The

question in such cases is, does the judgment claimant owe the United States the amount as claimed? And not whether a final judgment of the Court of Claims, or of the Supreme Court, is correct and valid.

In the *United States* v. *Young* (*supra*) it is held that Congress has not conferred power on the Supreme Court to issue writs of error to the Court of Claims. The cases cited in appellee's brief, *United States* v. *Ferriera* (13 How., 41), *Hunt* v. *Pallas* (4 How., 589), are to the same point, and have no controlling influence over the question at issue. We are not contending for other appellate jurisdiction in the Supreme Court than such as has been conferred by legislation of Congress.

Section 1089, Revised Statutes, provides for the payment of all final judgments made by the Court of Claims or Supreme Court on appeal, "out of any general appropriation made by law for the payment and satisfaction of private claims." * * *

It is urged by appellee that section 14 of the *Act of March* 3, 1863 (12 Stat. L., 768), and the *Act of March* 7, 1884 (23 Stat. L., 254), are identical in effect. The language of the acts does not warrant any such construction. Section 14 prohibited the payment of any money "out of the Treasury for any claim passed upon by the Court of Claims *till after an appropriation therefor shall be estimated for by the Secretary of the Treasury.*"

There is no such prohibition in the act of March 7, 1884, nor is any special reference made in such act to judgments of the Court of Claims. The Secretary is required (1) to transmit to Congress the amount due each

claimant, whose claim has been allowed in whole or in part; (2) that all estimates or appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress by the Secretary of the Treasury; (3) that he shall cause the same to be properly classified, compiled, indexed, and printed under the supervision of the chief of the division of warrants and estimates.

The acts are not at all identical, either in language, purpose, or intention. The former act absolutely prohibited the Secretary from paying judgments of the Court of Claims until estimated for by him. He could ignore such judgments or make estimates therefor in his discretion.

The latter prescribes duties to be performed by the Secretary without prohibiting the payment of judgments of the Court of Claims, and without making any special reference thereto. It is evident there was no intention on the part of Congress, either directly or by implication, to re-enact section 14, Act of March 3, 1863, which had been expressly repealed in 1866.

We do not attach the same importance to the word "estimated" that the appellee does; especially since the prohibition in the payment of judgments of the Court of Claims has been removed, and it is not necessary for the Secretary of the Treasury to delay such payment *until estimated for by him.*

The custom of Congress is one thing, the law another. Custom cannot supersede the law in this instance. Whether the Secretary could be compelled to pay these judgments

notwithstanding the custom adopted by Congress in making appropriations therefor is a matter we need not discuss.

This case was transmitted by the Secretary of the Interior under section 1063, Revised Statutes, and payment for any final judgment or decree rendered by the court is provided for in section 1065, Revised Statutes.

The second cause for dismissing the appeal is as follows:

> Because, since the appeal from the findings of the court below, Congress has appropriated the amount necessary to pay the same.

It is conceded that Congress, subsequent to the appeal in this case, appropriated money for the payment of the judgment.

We do not see how this can be urged as a reason for dismissing the appeal, which was taken within the ninety days required by law. It might authorize a proceeding for writ of mandamus to compel the Secretary of the Treasury to act in payment of the judgment, but can hardly be good ground for the dismissal of an appeal regularly taken under the law.

The appellee's case comes within the provision, "that none of the judgments herein provided for shall be paid until the right of appeal shall have expired." (Acts, 1st sess., 49th Cong., 282.)

The right of appeal had been exercised within the proper time in this case, which brought it within the intention and purview of the statute, notwithstanding Congress was rather late in its enactment.

Inasmuch as appellee's appropriation, with other claim-

ants, is contained in the same act, it is fair to consider all of the provisions of the act together, and when this is done there will not be much trouble in arriving at the sense and intention of the proviso quoted, and applying it to appellee's judgment.

A. H. GARLAND,
Attorney-General.
HEBER J. MAY,
Assistant Attorney.

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IN THE

Supreme Court of the United States.

OCTOBER TERM 1886.

No. 1024.

THE UNITED STATES, Appellants,

vs.

JOHN PAUL JONES, Administrator, Appellee.

APPELLEE'S BRIEF.

JAMES W. DENVER
JOHN PAUL JONES.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

THE UNITED STATES, Appellants,
vs.
JOHN PAUL JONES, Administrator of the Estate of GEORGE McDOUGALL, Deceased, Appellee. } No. 1024.

APPELLEE'S STATEMENT AND BRIEF.

Statement.

Under the provisions of the various acts of 28th September, 1850 (9 Stats. L., 519), 30th September, 1850 (9 Stats., 558), and 27th February, 1851 (9 Stats., 586), Redick McKee, George W. Barbour, and Oliver M. Wozencraft were appointed agents and commissioners to negotiate treaties with the Indians of California, who were then either in open or threatened hostility to the Federal Government. These agents or commissioners adopted the policy of feeding the Indians as the one best calculated to allay the increasing discontent and to prevent a general Indian war.

In furtherance of this line of policy, O. M. Wozencraft entered into the contract with decedent, set forth in finding V, (R., p. 7,) and the Indians were furnished with 650,000 pounds of beef (R., p. 8, finding VII) at 12½ cents per pound, amounting to $81,250, for which drafts on the Secretary of the Interior were given decedent by Commissioner Wozencraft.

This beef entered into the consideration for which the Indians parted with their lands; and although the treaties were never ratified by the Senate, the General Government took possession of said lands, assumed title, and disposed of them in the same manner as other portions of the public domain, without further compensation.

The Secretary of the Interior referred this case to the Court of Claims under the provisions of section 1063 of the Revised Statutes on December 1st, 1884, and the court gave judgment in favor of the appellee for the sum of $81,250, disallowing the sum of $19,500, the amount, in addition to the judgment, claimed under the terms of the contract.

From this judgment the Government appealed on the 3d day of May, 1884, and the appellees also prayed an appeal from so much of the judgment as disallowed said sum of $19,500, which prayer was granted on the 2d day of August, 1886.

The appellee insists that the court below erred in not giving judgment for the full amount claimed.

Brief of Argument.

The counsel for the appellee base their objection to the judgment of the court below upon the grounds that the petition declared upon an illegal contract, and that there being no claim upon a *quantum valebat*, there could be no recovery.

In their brief they say, in epitomizing:

"The cause of action in this case is founded upon McDougall's illegal contract, and it is not sought to recover upon the *quantum valebant*, as in the Norris case."

If it be admitted (as it is not) that the McDougall contract was illegal in its inception, and lacked subsequent ratification, it is respectfully submitted that, under the circumstances of this case, the appellee should recover the

actual value of the property which inured to the benefit of the Government, although no special count therefor was incorporated in the petition.

In The United States *v.* Burns (12 Wall., 246 [254],) the court say:

"And the Court of Claims, in deciding upon the rights of claimants, is not bound by any special rules of pleading."

This exact point arose in Clark *v.* The United States (95 U. S., 539); and in reversing the court below, it is said:

"It objected that the petition contains no count upon an implied contract for *quantum meruit*, it may be answered that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in the petition, although due in a different aspect from that in which his demand is conceived."

The question, therefore, of appellee's right to recover for a *quantum valebat* is not affected by the form of the pleadings in the lower court, but depends entirely upon the facts as found.

In the case just quoted from, the court, after deciding Clark's contract to be illegal because it did not conform to certain statutory requirements, proceeds:

"We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, * * * &c."

This proposition is too well established to require argument or the citation of authorities.

In defining what constitutes such an implied contract as fixes a legal liability upon the Government, this court say in Knote *v.* The United States (95 U. S., 149 [157]):

"To constitute such a contract there must have been some consideration moving to the United States, or they

must have received the money, charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake."

The courts, in applying the doctrine of these cases, have extended it to include instances where there was no pretense of an express contract, and where the property passed into the hands of the Government agents through a tort, if it be shown that such property, or the proceeds thereof, inured to the benefit of the United States. Thus, in Thayer's case, (20 Ct. Cls., 137,) where certain logs were seized by timber agents under instruction of the Land Office, and sold, it was held that the court had jurisdiction of an action to recover the proceeds of the sale of property so illegally seized, upon an implied contract.

The case at bar does not differ in principle from those cited.

Finding IV shows that—

"To avoid the threatened and quell the actual hostilities, the commissioners at once began to negotiate treaties with the Indians, by which they were required to leave their mountain resorts, to abandon their lands to the whites, to descend to the plains, and reside peaceably upon a tract of land selected for them."

And in finding V—

"The policy adopted by the Commissioner included the 'subsistence' of the Indians, and large quantities of beef and other provisions were stipulated for in the various treaties, and the office was notified that the same policy would have to be pursued throughout the whole State, and that this system was thought much better than the system of annuities," &c.

Thus it appears that the Indians were influenced "to abandon their lands to the whites" by the promise of "the large quantities of beef and other provisions stipulated for

in the various treaties." They received no consideration for the homes thus relinquished, excepting the provisions furnished the Government agents by claimant's decedent and a few others who likewise depended upon the honor and good faith of the Government. The United States, on the other hand, in consideration of these same supplies, received all the benefits which the commissioners sought, in the quelling of hostilities, and in the acquisition of undisputed title to the Indian land.

"The Indians who were dispossessed of their lands under these treaty stipulations ceased their warfare, and ever after remained peaceable, but never recovered possession of their lands, although the treaties were not ratified by the Senate; but the United States assumed title to said lands, and disposed of them in the same manner as other portions of the public domain have been disposed of." (Finding IX.)

In this case, therefore, even if the contract was illegal, appellee must recover upon a *quantum valebat*, and the measure of damage is fixed by the terms of the instrument, as it was in Clark's case (*supra*).

Appellee contends, however, that

THE CONTRACT WAS LEGAL,

and that the recovery must be according to the strict letter of the contract, viz., 650,000 pounds of beef, at 15½, amounting to $100,750.

The learned counsel for the appellants in characterizing the contract under which appellee claims as "unauthorized and illegal," entirely neglect to refer to the statutes in force at the time, or to point out wherein Wozencraft violated his instructions or exceeded his powers in entering into said contract.

The act of 1st May, 1820, (3 Stats., 568,) provides "that no contract shall hereafter be made * * * by the Department of War (Interior) *except under a law authorizing*

the same, or under an appropriation adequate to its fulfillment." In the case at bar there was no such appropriation, but it is insisted that the law authorized such a contract and that it was made in strict compliance therewith.

The act of 9th July, 1832, (4 Stats., 564.) prescribed the duties of the Commissioner of Indian Affairs, and the act of 30th June, 1834, (4 Stats., 736, section 7,) provided: "* * * And it shall be the general duty of Indian agents and sub-agents to manage and superintend the intercourse with the Indians within their respective agencies agreeably to law; *to obey all legal instructions given to them by the Secretary of War*, (Secretary of Interior, 9 Stats. L., 395, sec. 5.) the *Commissioner of Indian Affairs*, or the Superintendent of Indian Affairs, and to carry into effect such regulations as may be prescribed by the President."

The instructions given to Agents McKee, Barbour, and Wozencraft were of the broadest character. They were "to determine upon some rule of action which would be most efficient in attaining the desired object, which was, *by all possible means*, to conciliate the good feelings of the Indians, and to get them to ratify those feelings by entering into written treaties, binding on them, towards the Government and each other," (Finding 3, R., p. 5,) and the Government was promptly advised that they had "determined upon a rule of action," which was to furnish the Indians with necessary subsistence. (Finding 5, R., p. 6.)

No question ever has been, or can be, raised as to the legality of the instructions given by the Commissioner of Indian Affairs. If then, Indian agents, or commissioners to negotiate treaties, when obeying "legal instructions," had authority, under the law, to make purchases of "merchandise required at the making of any Indian treaty," the contract in suit is a valid and binding one. They had this authority, and it was derived from the same act which directed them "to obey the legal instructions" of the Commissioner, &c., and is found in section 13, which is as follows:

"SEC. 13. *And be it further enacted*, That all merchandise required by any Indian treaty for the Indians, payable after making of such treaty, shall be purchased under the direction of the Secretary of War (Interior, 9 Stats., 395) upon proposals to be received, to be based on notices previously to be given; *and all merchandise required at the making of any Indian treaty shall be purchased under the order of the Commissioners by such person as they shall appoint, or by such person as shall be designated by the President for that purpose.*"

The beeves furnished in this instance could not be such as were "payable after making of such a treaty," and hence governed by the provisions of the first clause of section 13 above quoted. It was clearly a transaction incident "to the making of a treaty," and came within the second clause of that section. Under the broad and comprehensive instruction to prevent war at all hazards, the agents were invested with discretionary power; and if, in their judgment, the exigencies of the situation required the purchase of provisions for the Indians, as an incident to the negotiation of treaties, they had ample power to make such purchases. The contract in suit was made on the 5th day of April, 1852, (Finding 5, R., p. 7,) and the cattle were delivered on or before the 17th day of May, 1852, (Finding 7, R., p. 8.)

It is evident, therefore, that there was an emergency, and a comparison of the dates shows that there was no time for the advertisement and proposals provided for in the first clause of section 13. Indeed, there was not even time to communicate with the home office. Treaty negotiations were pending, but the Indians were on the verge of an outbreak, and must be pacified. Provisions were required, the Department had been notified that the policy adopted was to furnish subsistence to the starving natives, (Finding 5, R., p. 6,) and there had been no word of complaint or disapproval of the actions of the commissioners, agents, or sub-agents, by the President, Secretary of the Interior, or the Commissioner of Indian Affairs. (Finding 5, R., p. 7.)

It would be difficult to conceive of a situation of affairs which would better warrant the exercise of the discretion conferred by the second clause of section 13.

In considering the effect of this clause in a case in which the material facts were identical with the case at bar, the Court of Claims said, in Belts' case (15 Ct. Cls., 107):

"If the articles furnished by the claimants in this case come within either of the classes referred to in section 13 of the act of 1834, above set out, they were 'merchandise required to the making of a treaty,' which were to be purchased under the order of the Commissioners, or they were such 'other purchases' as were to be made by such person as the President should designate for that purpose. In other words, purchases of this class did not come within the first clause of the thirteenth section of the act of 1834, and were not 'merchandise required by any Indian treaty for the Indians, payable after making such treaty,' and need not be purchased 'upon proposals to be received, to be based on notices previously to be given,'" &c.

All the questions involved in this case have been elaborately considered by the Court of Claims, and judgment given for the claimants, in several cases, but without passing specifically upon the question of the powers of the Commissioners or agents under section 13.

In Fremont's case (2 Ct. Cls., 461) the court say:

"How far the Government would be liable in cases of this kind, standing alone on the authority conferred and control given over Indian affairs to the Commissioner and agents under the acts of 1832 and 1834, it is not necessary for us to decide. It might be a fair subject for discussion whether the powers conferred and the discretion vested are not large and wide enough to bring a case of this description within the purview of the sixth section of the act of 1st of May, 1820." (3 Stats., 568.)

The McDougall contract, coming thus within the second clause of section 13, was binding upon the Government, but the Court of Claims gave judgment in all the other

similar cases, and, presumably, also in this, upon the proposition that there had been

A CONGRESSIONAL RATIFICATION.

In Fremont's case, Fremont & Roache's case (4 Ct. Cls., 252), and in Belt's case (15 Ct. Cls., 92), *all of which were identical with the case at bar*, the court below held that there had been such a Congressional ratification of the general policy pursued in California as to legalize and validate all contracts of this character irrespective of the original authority of the commissions to make such contracts. The facts upon which this ratification is based are as follows:

"On May 17, 1852, the Indian Office wrote agents McKee and Wozencraft saying: '* * * I have therefore to request that at the earliest practicable period you make a full and detailed report directly to this office of all contracts, debts, and liabilities made and incurred by agents of the Department in California.'" (Finding 5, R., p. 7.)

This letter was written after the office was fully advised of the course which had been pursued by the agents, and after a lengthy correspondence, in which these agents gave their actions in detail. The Department did not then, and never has in any way, disapproved of their course. On the contrary, on the 17th day of March, 1853, Congress was furnished, in an elaborate report by the Secretary of the Interior, with copies of all the correspondence upon this subject and with a full list of the debts incurred. (S. Ex. Doc., 4, Special Session.) Almost immediately an act was passed for the relief of John C. Fremont, (29th July, 1854—Stats. 10, ch. 165, p. 89,) giving him $183,025, with interest at 10 per centum per annum from June 1, 1851.

Shortly after this (in 1855) petitions were filed in the Court of Claims in the claims of Hensley, Stuart, (Belt,) Lewis, (Savage,) and claimant's intestate.

Ct. Cls., Old Series, 2d Sess., 35th Cong., No. 189 190, 191, 192.

At this time the Court of Claims had only the jurisdiction conferred by the act of 1852 (10 Stats., 613,) and could render no final judgment. Its only power was to determine the facts and report to Congress whether, in its judgment, the claimants were entitled to the relief prayed. In all the cases mentioned above, the court made a full and complete report to Congress of all the facts, but said that, as a matter of law, the Government was not responsible. In spite of this, Congress gave relief to Hensley in the sum of $96,575, (12 Stats., 847,) and by joint resolution to Samuel Norris, by referring his claim to the Court of Claims for adjudication. (2 Ct. Cls., 155.) Immediately following this the cases of Fremont (2 Ct. Cls., 461,) and Fremont & Roache (4 Ct. Cls., 252,) were tried, judgment given for claimants, and Congress called upon for the necessary appropriation wherewith to pay the same.

Again, in 1879, the same question was once more presented to the court and to Congress, in the Belt case, (15 Ct. Cls., 92,) and again the policy adopted by the commissioners was ratified by the appropriation of money sufficient to meet the judgment in favor of Belt's representatives.

Thus Congress, being fully advised of all the details and circumstances attending these transactions, both by a general report of the Secretary of the Interior and by reports of the Court of Claims in individual cases, has on many different occasions affirmed and reaffirmed its approval of the policy adopted in California.

This is the only claim of this character which has been presented to Congress or to the Court of Claims which remains unpaid. Every other one has met with judicial and legislative approval.

As a further evidence of the manifest intention of Congress to meet the expenses incident to the suppression of Indian hostilities in California, attention is called to the fact that Congress, by the act of August 5th, 1854, reimbursed

the State in the sum of $924,259.65 for expenses incurred in this behalf.

The Court of Claims, in Fremont's case (*supra*), in concluding an elaborate discussion of this subject, say:

"It is not necessary for us even to consider what would be our opinions or conclusions if the case stood on the contracts as sanctioned and approved by the executive authorities. We look at the acts of Congress cited (those above referred to) as clear and distinct legislative recognition of the obligations of the United States to pay the fair value of the subsistence furnished to these Indians through their regularly constituted Indian agents. Nor do we think its effect was intended to be limited and confined to the cases actually paid * * * They all rest upon the same foundation of right and justice."

The Government did not see fit to question this eminently just and fair conclusion of law at the time it was reached; it acquiesced in it when reaffirmed in Fremont and Roache's case, and even so late as 1879, when a judgment for $10,000 was rendered in favor of Belt's representatives, no appeal to this court was taken. The inference is clear that, in the case at bar, whilst the facts are not disputed, the appeal is taken from the *amount* of the judgment and not from the conclusions of law.

In whichever light the contract is viewed, whether as originally legal or illegal, the decedent must recover the full contract price of the beef furnished, viz., $100,750, because if subsequent ratification is the basis of recovery, there can be no ratification of a part without a ratification of the whole of the contract. (Story on Agency, sec. 250.)

In addition to this, it is insisted on the part of the appellee that there are certain rules applicable to the

LONG-ACCEPTED CONSTRUCTION

of the statutes involved in this case, which should govern.

The question of the liability of the Government, both in law and equity, for indebtedness arising under contracts

similar to the one in suit, and of the application of the laws then in force, to such contracts, has been, as has been shown, before the Court of Claims in various shapes ever since its organization. The decisions of that tribunal, for nearly a quarter of a century, have been uniform in asserting the liability of the Government. It is too late now for the appellants to question the soundness of these decisions. Every principle of public policy forbids the reversal of the construction of a statute which has been so long acted upon as to become part of the established law of the land, unless there be the most urgent reasons in equity or the clearest violation of law. If there be ambiguity in the statute, if the true meaning be the least in doubt, courts will not interfere and overthrow the construction placed upon it and acted upon for a long series of years, although their opinion would have been different if the question had been presented to them in the first instance.

Edwards' Lessee *v.* Darby (12 Wheat., 206).
Brown *v.* The United States (113 U. S., 568).

The imperfections of the human language are such that no statute can be framed in the consideration of which all minds will reach the same conclusion. The stability of those of our institutions which are founded on legislative enactments and the integrity of the statute law demand that an act once construed by the proper authority, acted upon, accepted and acquiesced in by all the parties in interest, shall not be changed in its effect upon property rights by the varied opinions of each succeeding tribunal which may be charged with its application to the subject-matter.

Respectfully submitted.

JOHN PAUL JONES.

JAMES W. DENVER,
Of Counsel.

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Of Counsel.

121-89

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Supreme Court of the United States.

THE UNITED STATES,
Appellant.
vs. No. 1,024.
JOHN PAUL JONES,
Appellee.

MOTION TO DISMISS APPEAL.

ARGUMENT OF APPELLEE.

JOHN PAUL JONES,
Administrator.

MILANS, PR.

Supreme Court of the United States.

OCTOBER TERM, 1886.

THE UNITED STATES,
Appellant,

vs.

JOHN PAUL JONES,
Administrator of the estate of George McDougall, deceased,
Appellee.

No. 1,024.

MOTION TO DISMISS APPEAL.

Comes now the appellee and moves this Honorable Court to dismiss the appeal taken in the above entitled cause:

First. Because said court is without jurisdiction to hear and determine said appeal.

Second. Because since the appeal from the findings of the court below, Congress has appropriated the amount necessary to pay the same.

BRIEF OF ARGUMENT.

On the 3d day of May, A. D. 1886, the Court of Claims found in favor of the claimant, in the sum of $81,250, and on the 25th of the same month an appeal to this court was granted.

It is urged by the appellee that this court has no jurisdiction to try and determine this, or any other appeal from the Court of Claims.

In other words, that recent legislation has divested this court of the appellate jurisdiction conferred upon it by the Act of March 17, 1866, (14 Stats., 9,) and left the law as it was when the case of Gordon *vs.* the U. S., (2 Wall., 561,) was decided.

The Court of Claims was given its present jurisdiction by the Act of March 3d, 1863, (12 Stats., 765.) The 5th section provided for an appeal to this court, from any final judgment or decree.

The 14th section was as follows:

SEC. 14. "That no money shall be paid out of the Treasury for any claim passed upon by the Court of Claims, till after an appropriation therefore shall be estimated for, by the Secretary of the Treasury.

The first case which came to this court, under the act quoted, was that of Gordon, (*supra*) and the court decided that Congress had conferred no jurisdiction upon the Court of Claims, from which an appeal would lie, because the findings of that tribunal lacked all the elements of finality which are essential to a judgment. The Secretary of the Treasury had a supervisory jurisdiction, and must "estimate" for the amounts found due, before they could be paid, and neither the Court of Claims nor this court could enforce their judgments or decrees by any judicial process. The Secretary might estimate or he might not, and Congress might or might not appropriate, as its wisdom dictated.

The elaborate and learned opinion of Chief Justice Taney, which was never filed in this case, now appears as an appendix to 117 U. S. (p. 697.) The reasons there given for the opinion reached by a majority of the court are clear and conclusive, and whilst it may not be proper to refer to them as authorative and binding upon the court, the appellee wishes to

call particular attention to them in connection with the case at bar.

The decision in the Gordon case (*supra*) has been cited with approval in the U. S. *vs.* Alire (6 Wall, 573), U. S. *vs.* O'Grady (22 Wall, 641), and U. S. *vs.* Langfords (11 Otto, 341).

The Act of 17 March, 1866, (14 Stats., 9,) above referred to, simply repealed Section 14 of the Act of 1863, leaving the clause providing for appeal to this court in full force and effect, and never since then, has the jurisdiction of this court in such cases been questioned, until now; and it is disputed here, mainly in the light of legislation enacted subsequent to the Act of 1866, and to which the attention of the court has never been called.

The Act of March 3, 1863, (12 Stats., 756,) with the obnoxious 14th section stricken out has been incorporated into the Revised Statues, and will be found under the title "The Court of Claims."

In the same revision, (Section 236,) is found the following general provision:

SEC. 236. "All claims and demands, whether by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Department of the Treasury."

This section is broad and general and contains no limitations or exceptions. The finding of the Court of Claims, in favor of a claimant, does not change the nature of the demand; it is still a claim against the Government, and must always remain so until it is paid. It must, therefore, under Section 236, be "settled and adjusted in the Department of the Treasury." The finding of the court amounts to no more than the finding of any auditor; it must pass the proper Account-

ing Officer of the Treasury, and be subjected to their scrutiny and revision. Whether these officers ever have or ever would, in practice, change the balances found due by the court is immaterial, if the power to do so is in them. The power to *adjust and settle all* claims, must of necessity, include the power to increase or diminish the amount adjudged to be due, and that power is in the Treasury officials.

This section of the Revised Statutes alone would seem to be sufficient to establish such a supervisory jurisdiction in the Treasury Department as to defeat the jurisdiction of this court; but there is later and more forcible legislation than this.

The findings of the Court of Claims are by the express provisions of the Act of March 3, 1875, subject to be revised by the Secretary of the Treasury. That act is as follows, (Supmt. R. S., 185:)

"That when any final judgment recovered against the United States or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set off, and discharges his judgment or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States.

But if such plaintiff, or claimant, denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment, or claim, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment.

And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch.

And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Secretary with six per cent. interest thereon for the time it has been withheld from the plaintiff."

The power of the Secretary to review a judgment of the Court of Claims in the absence of any express statutory authority, such as the above was under consideration in O'Grady's case, (22 Wall., 641), decided February 15, 1875, sixteen days before the passage of the act just quoted. The court held that the Secretary could not review a judgment of the court, and deduct certain taxes from the amount found due.

The provisions of the act of 1875, (*supra*), are not confined to the findings of the Court of Claims; but refer equally to appeals therefrom to this court. Of course such general provisions of law would follow the case to a higher court, but beyond this, the language of the act is "*any final* judgment recovered against the United States," and applies with equal force to a final judgment of this court as to a judgment of the Court of Claims, which was, prior to the passage of this act, final if unappealed from.

The final judgment of this court (if they can be called final judgments, since the passage of the act), are then to be subjected to set-offs, and the balance found due, are to be changed whenever the Secretary of the Treasury, or in certain events, courts of inferior jurisdiction determine that the claimant is in-

debted to the government. It makes no difference that the Court of Claims has jurisdiction, (R. S. Sec. 1,059, clause 2) of "all set-offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any person making claim against the government in said court."

As an illustration of the power conferred upon the Secretary of the Treasury, it is easy to conceive that he and the Attorney-General might differ in opinion as to what constituted a legal set-off, or counter claim in any given case in the Court of Claims. If so, and the Attorney General did not plead it, the judgment in the court below, after affirmance in this court, would be subject either to be changed at his hands, or to be charged in some other court, with an amount which could and should have been liquidated in the Court of Claims and in this court.

To concede to the Secretary, or to any court, such power over the judgments of the Court of Claims deprives them of those elements which confer jurisdiction of appeals in this court, and leave them nothing more than Commissioners awards.

In Hayburn's Case (2 Dall., 409) it was held that an Act of Congress, conferring upon Federal Judges power to hear and determine certain pension cases, but giving the Secretary of War, in certain events authority to withhold payment, did not confer a judicial power. The same doctrine was announced in Yale Todd's Case, (Feburary 17, 1794. See note to U. S. *vs.* Ferriera, 13 How., 41.) In the latter case substantially the same question was at issue and similarly decided, as also in Hunt *vs.* Pallas (4 How., 589.)

After referring to these cases, Chief Justice Taney, in the unfiled opinion in Gordon's Case, above referred

to, (117 U. S., p. 704,) uses the following language, which is pertinent to the case at bar:

"And it is very clear that this court has no appellate jurisdiction over these special tribunals, and cannot, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising *independently* the judicial power granted to the United States. It is only from such judicial decisions that appellate power is given to the Supreme Court.

Indeed no principle of Constitutional law has been more firmly established or constantly adhered to, than the one above-stated—that is, that this court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term, and when it depends upon the legislature to carry its opinion into effect or not, at the pleasure of Congress."

In addition to this there is not now, and never has been any machinery by which this court could carry into effect the judgment or decree in a case from the Court of Claims, and as was said in Hunt *vs.* Pallas (*supra*) by the court in denying its jurisdiction:

"It would be useless and vain for this court to issue a writ of error, and bring up the record and proceed to judgment upon it, when, as the law now stands, no means or process is authorized, by which our judgment could be executed."

No matter what the mandate of this court be, the Court of Claims has no power to issue an execution or to take any steps supplemental to judgment; and if, therefore, there were moneys in the Treasury duly appropriated and available to pay the judgment, and the Treasury officials for any cause should refuse to pay, there would be no recourse except through the process of *some other tribunal*.

The writ of mandamus or some other suitable process would have to issue from some court of competent jurisdiction to compel the offending official to obey a mandate to the Court of Claims issuing from this Court to the Court of Claims.

It is respectfully submitted that this state of the law deprives the judgments of the Court of Claims of that solemnity which is necessary to give this court appellate jurisdiction.

Since the passage of the Act of 3d March, 1875, the effect of which has just been under discussion, Congress has again legislated with reference to claims against the Government.

The following clause was inserted in the Act of 7th March, 1884, (23 Stats., 254:)

"That the Secretary of the Treasury shall, at the commencement of each Session of Congress, report the amount due each claimant, whose claim has been allowed, in whole or in part, to the Speaker of the House of Representatives, and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration. And hereafter all estimates of appropriations and estimates of deficiencies in appropriations, intended for consideration and seeking the action of any of the Committess of Congress, shall be transmitted to Congress, through the Secretary of the Treasury, and in no other manner; and the said Secretary shall first cause the same to be properly classified, compiled, indexed and printed, under the supervision of the chief of the division of warrants, estimates and appropriations of his department."

This act is identical in effect, with the 14th Section of the Act of 1863, (*supra*,) which this court said in the Gordon case, was sufficient to deprive it of appellate jurisdiction. The Secretary must *estimate* for claims, such as the one involved in the case at bar,

and the words of Chief Justice Taney are as applicable here as they were in the Gordon case, (117 U. S., p. 702.)

"It is true the act speaks of the judgment or decree of this court. But all that the court is authorized to do, is to certify its opinion to the Secretary of the Treasury, and if he inserts it in his estimates, and Congress sanctions it by an appropriation, it is then to be paid, but not otherwise. And when the Secretary asks for this appropriation, the propriety of the estimate for this claim, like all other estimates of the Secretary, will be open to debate and whether the appropriation will be made or not, will depend upon the majority of each House. The real and ultimate judicial power will, therefore, be exercised by the Legislative Department, and not by that department to which the Constitution has confided it."

The clause in the Act of 1884, (*supra*,) re-enacts Section 14 of the Act of 1863, (*supra*,) and is only broader in that it includes all classes of claims.

If it should be urged that Section 1089, Revised Statutes, which provides for the payment of final judgments of the Court of Claims, "out of any general appropriation, made by law, for the payment and satisfaction of private claims," has any effect upon the question herein raised, the answer is, that this clause was part of the Act of 1863, and was under consideration in this court when it was decided that Section 14 of that act, defeated its jurisdiction.

More than this, there is no such general appropriation, and never has been, except, possibly, in some isolated cases.

An examination of the deficiency appropriation bills of recent years shows that claims are paid upon a list or schedule sent by the Secretary of the Treasury to Congress. During the session just closed four separ-

ate lists were transmitted to Congress and appropriated for. (See H. Ex. Docs., 70, 210, 225 and 294.)

But if this clause ever was mandatory upon the Secretary, the Act of 1875 (*supra*) which made it his duty to off-set the indebtedness of claimants against judgments in their favor, destroyed its force and effect, and left it discretionary with him to pay or not; and this even if there had been such a general appropriation as Sec. 1089 refers to it.

It is submitted that it has been shown that the Secretary of the Treasury has a general supervisory jurisdiction over judgments of the Court of Claims; that they must be estimated for, and that Congress may or it may not appropriate to meet them. It only remains to call attention to the actual practice as bearing out these propositions.

Prior to the Act of March 3d, 1875, it had been the custom to appropriate a gross sum for the payment of these judgments before they were rendered.

(Stats. V. 14, p. 195; V. 15, pp. 95, 287; V. 16, pp. 235, 480; 17, pp. 82, 508; V. 18, pp. 108, 369.

But since the passage of that act, the custom has been reversed; (presumably in deference to the Secretary, and to avoid the possibility of appropriating the full sum to pay a judgment, the amount of which that official might see fit to reduce), and appropriations have been made only to pay judgments already rendered, and usually the names of the beneficiaries have been inserted, with the amount due each.

The act of 3 March, 1877, (Stats. 19, 347,) provides, "For the payment of judgments heretofore rendered in the Court of Claims, in favor of the following named persons, &c., &c."

The same, or substantially the same language is used in succeeding appropriations, and down to the last bill

providing for such payments, the name of the claimant and the amount due him is subjected to the scrutiny of Congress.

(Stats. V. 20, 116, 234, 411; V. 22, 258, 587, (Deficiency Bill) V. 23, 240, 452.—Laws 1st 49th Con., 275.

There is no known law or rule of action, except possibly a rule of high morality, which can be invoked to compel Members of Congress to vote for each item of such a bill. Every name inserted into these various deficency bills, is subject to the objection of any member or of a majority of members. So long as the law remains as it now is, "the real and ultimate judicial power will, therefore, be exercised by the Legislative Department, and not by that department to which the Constitution has confided it."

The second cause for dismissal, and one which applies, not to judgments of the court in general, but only to the case at bar, is that Congress has made the necessary appropriation to pay the judgment herein. By reference to page 280, line 13 of the laws of the 1st Session of the 49th Congress, it will be seen that there is appropriated to pay John Paul Jones, administrator, the sum of $81,250.00. This appropriation was made on the 4th day of August, 1886, over two months after the appeal herein was taken.

It passed the Secretary of the Treasury in his "estimates;" it passed the Committees of Congress, and finally passed both Houses and became a law. It is true that the act of which it is a part, provides (p. 282,) that "none of the judgments herein provided for shall be paid until the right of appeal shall have expired." In this case there was no *right* of appeal; if any had ever existed it had been exercised; the right was exhausted, and this fact must have been known to the

Secretary and to Congress. This case, therefore, is governed by the words found on page 256, viz: "That the following sums be and the same are hereby appropriated, &c."

In conclusion, we beg leave to once more call attention to the power of Congress to have appropriated for this or any other of the hundreds of judgment provided for in this bill, or to have stricken any of them out. An instance may be found in 17 Stat. 82, where an appropriation is made to pay the judgments, but provision is made "That no part of this sum shall be paid upon any judgment rendered in favor of George Chorpenning, &c."

Respectfully submitted,

JOHN PAUL JONES.